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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Alfred C. Sikes, Chairman

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-538

In re Applications of

SARASOTA-CHARLOTTE BROADCASTING CORPORATION	File No. BPH-870908MX
CAWLEY BROADCASTING CORPORATION, INC.	File No. BPH-870910MM
ENGLEWOOD RADIO, INC.	File No. BPH-870910NS
SANDPIPER BROADCASTING, INC.	File No. BPH-870910OG

For Construction Permit for a
New FM Station on Channel 290A
in Englewood, Florida

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1991; Released: March 25, 1991

By the Commission:

1. By this action we affirm a Review Board Decision, *Sarasota-Charlotte Broadcasting Corporation*, 5 FCC Rcd 3837 (Rev. Bd. 1990),[1] granting the application filed by Sandpiper Broadcasting, Inc. (Sandpiper) for a new FM Station at Englewood, Florida. Now before the Commission are applications for review filed by two of the losing applicants and a contingent application for review filed by Sandpiper.[2]

2. We will deny the Application for Review filed by Cawley Broadcasting Corporation, Inc. (Cawley). Further comment is warranted with respect to the denial of credit for Sarasota-Charlotte Broadcasting Corporation's (SCBC) integration proposal. We will also grant SCBC's Application for Review to delete a diversification demerit. Finally, we will grant Sandpiper's Contingent Application for Review, award it a preference for its coverage proposal, and grant its application.

SCBC's Integration Proposal

3. When SCBC filed its application (FCC Form 301), it was not required to include its integration proposal. [3] Its Equal Employment Opportunity (EEO) statement (FCC Form 396-A), which was required to be filed as part of SCBC's application, however, stated that Kent Higgens would be general manager of its proposed station. SCBC subsequently amended the EEO statement in its application to name Lowell Thomas general manager. When SCBC filed its integration and diversification statement with the ALJ, it named its president and 92.2 per cent owner, Ted Ewing, as its general manager. The Board affirmed the ALJ's rejection of SCBC's latter integration proposal as an impermissible variance from its application and as an improper upgrading of its comparative showing. 5 FCC Rcd at 3838 ¶¶ 5-7.

4. SCBC argues that the precedents cited by the Board involved an earlier Form 301, which required submission of an integration proposal as part of the application. *See Leflore-Dixie, Inc.*, 100 FCC 2d 331, 334 (Rev. Bd. 1985); *N. E. O. Broadcasting Co.*, 103 FCC 2d 1031, 1033-35 (Rev. Bd. 1986); and *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1494 (Rev. Bd. 1979). It also asserts the Board ignored prior decisions accepting post-cut-off qualifying data not specifically required by the application. *Northland Communications*, 100 FCC 2d 914, 917 (Rev. Bd. 1985); *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984); *Martin Intermart, Inc.*, 3 FCC Rcd 1650 (Rev. Bd. 1988); *Houston Family TV, Ltd.*, 101 FCC 2d 661, 667 (Rev. Bd. 1985). It thus argues that the ALJ and the Board should have accepted the showing made in its integration statement, asserting that the information in it had not been previously required. SCBC does admit, however, that once an applicant voluntarily sets forth an integration proposal, it cannot improve that proposal after the B cut-off date.

5. On the one hand, none of the parties or the Board have cited a precedent where the Commission held that statements in an EEO proposal were an integration proposal. On the other hand, while the cases cited by SCBC support the proposition that the Commission will accept post cut-off filings of information not required by the application, they provide no basis for considering an integration statement that is inconsistent with representations in the application. Here, SCBC included in the application a statement concerning who would be general manager of its proposed station. It thus voluntarily submitted part of its integration proposal, and any departure from that proposal after the cut-off date is an impermissible variance and upgrading of its comparative showing. There is nothing in the cases cited by SCBC that would prohibit the Commission from considering information in SCBC's application or that would authorize the Commission to consider evidence that is at variance from information in the application.[4] Thus, the ALJ and the Board properly refused to consider evidence of Ewing's integration proposal.

SCBC's Diversification

6. In its integration and diversification statement, exchanged within 30 days of the Hearing Designation Order, SCBC requested a daytimer preference and it pledged to divest WENG, a daytime AM station in Englewood, within three years from the commencement date of program test authority for its proposed FM station. Citing the variance between the integration proposal in SCBC's diversification and integration statement and its application, the Board rejected the entire statement and assessed a diversification demerit against SCBC. SCBC argues that the Commission should credit its divestiture pledge even if the Commission rejects its integration proposal.

7. In *FM Broadcast Assignments*, 101 FCC 2d 638, 647 n.18 (1985), the Commission held that all daytimers, even those which did not qualify for upgraded broadcast experience, could avoid a diversification demerit if they timely pledge to divest their daytime stations within three years from the grant of program test authority. SCBC timely pledged to divest WENG pursuant to *FM Broadcast Assignments* and we will credit that pledge without regard to the integration aspects of its proposal. However, in view of our prior rejection of SCBC's integration proposal, the credit awarded Sandpiper and Cawley for their integration proposals, and the fact that both of the latter applicants have also pledged to divest all media interests, the crediting of SCBC's divestiture pledge is not a decisionally significant factor in this case.[5]

Applicants' Coverage Proposals

8. Sandpiper and Cawley initially proposed identical FM transmission facilities. Neither applicant was able to obtain FAA approval for those facilities. Thereafter, Sandpiper located a new site and proposed maximum power and height from that site, thereby increasing its coverage area. In contrast, Cawley modified its proposal at the original site by reducing both its antenna height and the size of its coverage area. The ALJ, relying on the lesser coverage for each applicant either as of the cut-off date or as set out in its most recent engineering amendment, awarded Sandpiper a moderate preference because its cut-off proposal would serve almost two times as many people as Cawley's amended proposal (68,823 to 32,605). *Sarasota-Charlotte Broadcasting Company*, 4 FCC Rcd 8106, 8108 ¶ 22 (1989). The Board, citing *Newton Television, Ltd.*, 5 FCC Rcd 2755 (1990), found that, because the coverage proposals were comparable prior to the cut-off date, neither applicant could benefit from any changes which occurred because of post-cut-off amendments and that none of the applicants is entitled to a coverage preference. Cawley argues that Sandpiper should not be allowed to rely on an abandoned site proposal, and that in any event, because all of the areas are served by numerous broadcast services, if Sandpiper is awarded a coverage preference, it is entitled to only a very slight preference.

9. In *Newton Television* we held that an applicant cannot improve its comparative standing due to the involuntary loss of its site. However, in *Woman's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1986), we held that applicants are allowed to restore credit lost as a result of circumstances beyond their control. Thus, while Sandpiper is entitled to restore or maintain the service area proposed as of the cut-off date, it is not entitled to any credit for the post-cut-off increase in its service area. In contrast, Cawley must bear the burden of its reduced service because its post-cut-off amendment fell short of the service area specified as of the cut-off-date. Compare *WIOO, Inc.*, 95 FCC 2d 974, 995 ¶ 50 (1983) (media interests acquired after cut-off date weighed against applicant for diversification purposes). *See also Newton Television, Ltd.*, 5 FCC Rcd at 2756 ¶ 7. Thus, the ALJ in this case properly found that Sandpiper is entitled to a coverage preference based on the discrepancy between Sandpiper's cut-off date service area proposal and Cawley's smaller post-cut-off service area proposal. However, in view of the numerous broadcast services already available in the area to be served, Sandpiper is entitled to only a slight coverage advantage. *Jared Broadcasting Co., Inc.*, 1 FCC Rcd 181, 189 ¶ 46 (Rev. Bd. 1986), *reconsideration denied* FCC 86R-81, released December 3, 1986, *review denied* FCC 87-312, released October 5, 1987.

The Comparative Evaluation

10. Having affirmed the Board's rejection of SCBC's integration proposal, Cawley and Sandpiper are the only applicants with 100 per cent integration credit. The grant of Sandpiper's application is clearly warranted. Both applicants are equal on diversification and Sandpiper is entitled to a very slight, but cognizable preference for coverage. Moreover, its 100 per cent integration proposal is enhanced by 50 per cent female ownership and broadcast experience, whereas Cawley's integration proposal is enhanced only by broadcast experience. Although Cawley has more extensive and superior broadcast experience, that circumstance is deemed of minor significance under the *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). Thus, Sandpiper's proposal will provide the best practicable service on an overall basis and accordingly it is the winner on comparative grounds.

11. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Supplement Application for Review filed November 13, 1990 by Sarasota-Charlotte Broadcasting Corporation IS GRANTED and that the Supplement to Application for Review filed November 13, 1990 by Sarasota-Charlotte Broadcasting Corporation IS ACCEPTED.

12. IT IS FURTHER ORDERED, That the Application for Review filed July 30, 1990 by Cawley Broadcasting Corporation, Inc. IS DENIED; that the Application for Review filed July 27, 1990 and Supplemented on November 13, 1990 by Sarasota-Charlotte Broadcasting Corporation IS GRANTED to the extent indicated herein and in all other respects IS DENIED; and that the Contingent Application for Review filed July 30, 1990 by Sandpiper Broadcasting, Inc. IS GRANTED.

13. IT IS FURTHER ORDERED, That the Review Board Decision, *Sarasota-Charlotte Broadcasting Corporation*, 5 FCC Rcd 3837 (1990) IS MODIFIED as reflected herein; that the Applications filed by Sarasota-Charlotte Broadcasting Corporation (File No. PH-870908MX) and Cawley Broadcasting Corporation, Inc. (File No. PH-870910MM) ARE DENIED; and that the application filed Sandpiper Broadcasting, Inc. (File No. BPH-870910OG) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Englewood Radio, Inc. did not file an Application for Review and the Board's Decision is thus final with respect to the denial of its license application.

[2] An Application for Review was filed July 27, 1990 and a Petition for Leave to Supplement Application for Review and a Supplement, were both filed November 13, 1990 by Sarasota-Charlotte Broadcasting Corporation (SCBC); an Application for

Review was filed July 30, 1990 by Cawley Broadcasting Corporation, Inc. (Cawley) and a Contingent Application for Review filed July 30, 1990 by Sandpiper. Oppositions to the Petition for Leave to Supplement were filed November 16, 1990 by Cawley and November 20, 1990 by Sandpiper. The Petition for Leave to File Supplement will be granted to permit consideration of a recent Review Board decision. Oppositions to the Applications for Review and the Contingent Application for Review were filed on August 13, 1990 by Cawley and by Sandpiper, and on August 14, 1990 by SCBC and by Sandpiper.

[3] In *Revision of Application for Construction Permit*, 4 FCC Rcd 3853, 3865 (1989), Form 301 was revised to require a statement of proposed integration for applications filed on or after June 26, 1989.

[4] In its Supplement to Application for Review SCBC argues that the Board's rejection of its integration proposal is inconsistent with the recent unreviewed interlocutory order in *Mableton Broadcasting Company*, 5 FCC Rcd 6314 (Rev. Bd. 1990). In the *Mableton* proceeding an exhibit presented during the hearing failed to repeat commitments made in the applicant's integration statement. The applicant was allowed to amend its hearing exhibit to include its integration proposal. SCBC argues that, like the applicant in the *Mableton* proceeding, it did not intend to create a variance, and that its hearing exhibits track its integration statement. However, unlike *Mableton*, where the Board found that the applicant had made a technical error in failing to repeat a prior representation, SCBC intentionally listed Higgens as its general manager, and Ewing's integration proposal is thus in conflict with the earlier representation in SCBC's application. Moreover, once the applicant in *Mableton* conformed the hearing exhibit to its integration statement there was no variance. Here, even if the Commission were to accept SCBC's integration statement, there would be a variance with the representations in its application. Thus, the *Mableton* proceeding provides no reason for us to review the Board's determination in this proceeding.

[5] SCBC also argues that the Board and the ALJ erred in failing to consider its superior broadcast record. However, in view of the ruling denying credit for its integration proposal, and Sandpiper's comparative credits, SCBC's past broadcast record is not decisionally significant.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-410

In re Applications of

SCOTTSDALE TALKING MACHINE AND WIRELESS CO., INC.	File No. BPH-870909MF
GIL L. LYONS	File No. BPH-870910MC
HOPE VALLEY FM LIMITED PARTNERSHIP	File No. BPH-870910ME
PATRICIA HAMPTON	File No. BPH-870910NE
Julia S. Zozaya d/b/a AMERICAN INTERNATIONAL DIVERSIFIED	File No. BPH-870910NH
Philip C. Davis and Lisa M. Davis d/b/a PARADISE VALLEY BROADCASTERS	File No. BPH-870910NK

For Construction Permit for
a New FM Station on Channel 290A
in Paradise Valley, Arizona

Appearances

Morton L. Berfield and *John J. Schauble* on behalf of Camelback Radio Broadcasters Limited Partnership, *Rachel D. Cramer* and *Howard N. Weiss* on behalf of Scottsdale Talking Machine and Wireless Co., Inc., *Russell C. Powell* on behalf of Gil L. Lyons, *Stephen Diaz Gavin* on behalf of Hope Valley FM Limited Partnership, *Neal J. Friedman* and *Peter H. Feinberg* on behalf of Patricia Hampton, *Margot Polivy* on behalf of Julia S. Zozaya d/b/a American International Diversified, *James A. Stenger* and *Raymond J. Kimball* on behalf of Philip C. Davis and Lisa M. Davis d/b/a Paradise Valley Broadcasters, and *Jerry Hermele* on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOSEPH P. GONZALEZ

Issued: March 15, 1991; Released: March 25, 1991

1. This proceeding was designated for hearing by *Hearing Designation Order* DA 88-1254, adopted August 8, 1988 by the Chief, Audio Services Division. This is a multi-applicant proceeding for authority to construct a new FM station on channel 290A in Paradise Valley, Arizona. The remaining applicants are: Scottsdale Talking Machine and Wireless Co., Inc. (Scottsdale); Gil L. Lyons (Lyons); Hope Valley FM Limited Partnership (Hope Valley); Patricia Hampton (Hampton); Julia S. Zozaya d/b/a American International Diversified (A.I.D.); and Philip C. Davis and Lisa M. Davis d/b/a Paradise Valley Broadcasters (PVB).[1]

2. The applications were designated for hearing on the following issues:

> (1) If a final environmental impact statement is issued with respect to Diversified (A.I.D.), in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.
>
> (2) To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: Hope Valley, Associates.
>
> (3) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (4) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

3. By *Order* FCC 90M-207, released on February 1, 1990, the contingent environmental issue designated against A.I.D. was eliminated. Summary decision in Hope Valley's favor of the air hazard issue was granted by *Order* FCC 89M-1938, released July 25, 1989.

4. By *Order* FCC 89M-1914, released on July 21, 1989, the Presiding Judge added the following city grade coverage issue against the application of Patricia Hampton:

> To determine whether the transmitter and antenna site proposed by Patricia Hampton complies with the city-grade coverage requirements of Section 73.315 of the Commission's Rules; and To determine the effect of the evidence adduced pursuant to this issue on the basic qualifications of Patricia Hampton to be a Commission licensee.

5. Hampton's request to amend its application to reflect a new antenna site was granted by *Memorandum Opinion & Order* FCC 89M-2268, released September 15, 1989, and her Motion for Summary Decision in her favor of the city grade coverage issue was granted by *Memorandum Opinion & Order* FCC 89M-2405, released on October 4, 1989.

6. Hearing sessions were held at the Commission from October 3, 1989, through October 6, 1989, and on October 10 and October 31, 1989, after which the record was closed. Proposed Findings of Fact and Conclusions of Law and replies thereto have been filed by all of the applicants, and the Mass Media Bureau has filed its proposed findings of fact and conclusions of law with respect to the comparative coverage issue.

SCOTTSDALE TALKING MACHINE AND WIRELESS CO., INC.

Findings of Fact

7. Scottsdale is an Arizona corporation organized in 1983. Its two stockholders are Katharine Klein and Randy Baca Hensel (Scottsdale, Ex. #1). Mrs. Klein owns 60 percent of the stock and serves as President, Treasurer and one of Scottsdale's two directors, and Mrs. Hensel owns 40 percent of the stock and serves as Vice President, Secretary, and Director (Scottsdale, Ex. #1). The husbands of Mrs. Klein and Mrs. Hensel have both executed statements disclaiming any community property interest in their wives' Scottsdale shares, and they have expressly acknowledged that the shares in Scottsdale held by their wives are their wives' sole and separate property (Scottsdale, Ex. #1, p. 1). *Diversification*

8. Neither Scottsdale nor its shareholders has any ownership interest or holds any corporate management position with any medium of mass communications (Scottsdale, Ex. #1, p. 2). Katharine Klein is currently employed in a non-management position, as a Sales Account Executive at station KKLT(FM), Phoenix, Arizona. Mrs. Klein has indicated that she will resign from her position at the station prior to the commencement of program test operations at Scottsdale's proposed station (Scottsdale, Ex. #1, p. 2).

Best Practicable Service

Katharine Klein

9. Mrs. Klein proposes to work full-time at Scottsdale's station or at least forty (40) hours per week, as the station's General Manager (Scottsdale, Ex. #2, p. 1). In this position, she will have overall responsibility for the management and supervision of all aspects of the station's operations (Scottsdale, Ex. #2, p. 1), and she will also directly supervise the station's sales, engineering and traffic personnel (Scottsdale, Ex. #2, p. 2).

10. Mrs. Klein has lived in Paradise Valley since the Fall of 1981 and within the proposed service area since August 1980 (Scottsdale, Ex. #2, p. 1; Tr. 263). Mrs. Klein has been a member of the Phoenix Chapter of American Women in Radio and Television since 1986, and she served on its Board of Directors for a two-year period between 1987 and 1989 (Scottsdale, Ex. #2, p. 2). According to Mrs. Klein, the Phoenix chapter engages in both professional and charitable activities (Tr. 266-70). She has also been actively involved, since 1985, in the Toby House, a residential and outpatient facility serving the needs of mentally ill young adults (Scottsdale, Ex. #2, p. 2). Mrs. Klein served as Secretary of the Toby House Guild for a one-year term spanning 1985-1986, after which she served as President of the organization from 1986 to 1987 (Scottsdale, Ex. #2, p. 3). She has also been a member of the Board of Directors of Toby House since 1986 (Scottsdale, Ex. #2, p. 3).

Randy Baca Hensel

11. Mrs. Hensel proposes to work at the station full-time, at least forty (40) hours a week as its Station Manager (Scottsdale, Ex. #3, p. 1). In that role, she will assist the General Manager in formulating and implementing station policy, and she will also oversee all aspects of the station's operations when the General Manager is absent from the station (Scottsdale, Ex. #3, p. 1). In addition, Mrs. Hensel will be directly responsible for supervising the station's programming staff, developing and implementing public affairs programming, and directing the station's public relations and promotional activities (Scottsdale, Ex. #3, pp. 1-2).

12. Mrs. Hensel is a female of Hispanic descent (Scottsdale, Ex. #3, p. 1). Since 1976, she has resided continuously in Phoenix, Arizona, which is within the primary service area of the proposed station (Scottsdale, Ex. #3, p. 1). Mrs. Hensel has been a member of the Soroptomist International of Phoenix since January 1977, serving as Corresponding Secretary in 1984-1985; Second Vice President in 1985-1986; First Vice President in 1986-1987; President in 1987-1988; and Immediate Past President and Board Member in 1988-1989 (Scottsdale, Ex. #3, p. 4). In addition to attending weekly meetings, Mrs. Hensel has chaired a number of committees of the organization, including Community Service, Growth and Development, and the Selection Committee for Arizona Women's Town Hall (Scottsdale, Ex. #3, p. 4). She also planned and implemented the organization's annual Christmas party for low income, elderly/handicapped residents of Westward Ho, a housing project for low-income residents of Phoenix, and has helped raise funds for a number of charities (Scottsdale, Ex. #3, p. 4). Mrs. Hensel founded Arizona Women's Employment & Education, Inc., an organization that assists women on public assistance in obtaining employment and becoming self-sufficient (Scottsdale, Ex. #3, p. 5). From 1981 through 1986, Mrs. Hensel served as a technical advisor and fundraiser for the organization, (Scottsdale, Ex. #3, p. 5), and from September 1986 to September 1987, she served on its Board of Directors and the Executive Committee, and from September 1987 to September 1988 she served as Vice Chairman of its Board of Directors (Scottsdale, Ex. #3, p. 5). Since that time, Mrs. Hensel has been a technical advisor to the organization and its Board (Scottsdale, Ex. #3, p. 5. Mrs. Hensel also founded the St. Stephen's Grief Support Group and is still a member. She was also a member of the Private Industry Council for Maricopa County, Arizona from 1985 to 1986, which provides planning and oversight of all Job Training Partnership Act funds spent in Maricopa County in providing employment and training services to low-income persons (Scottsdale, Ex. #3, pp. 5-6).

13. Mrs. Hensel also served as a member of the Grand Canyon Saquaro Chapter of the National Foundation of the March of Dimes from 1979-1981 (Scottsdale, Ex. #3, p. 6), and was Chairperson of the Phoenix area Mother's March Campaign in 1980. Mrs. Hensel also wrote, produced and narrated a slide presentation on March of Dimes activities which is still widely used (Scottsdale, Ex.

#3, p. 6). She also served on the Board of Directors of the Maricopa YWCA from January to June 1987 (Scottsdale, Ex. #3, p. 7).

14. Mrs. Hensel was appointed by the Mayor and City Council of the City of Phoenix to the Citizens' Bond Committee of 1984, and served as Vice Chairperson of the Finance Committee and on its Block Grant Steering Committee for Phoenix, Arizona between 1978 and 1982 (Scottsdale, Ex. #3, p. 7). Mrs. Hensel also chaired the Mountain Preserve Subcommittee of the Citizens' Bond Committee in 1979, which obtained 10 million dollars to purchase a large section of the Phoenix Mountain Preserve (Scottsdale, Ex. #3, pp. 7-8).

15. In 1986 and 1987, Mrs. Hensel served for eighteen months on the Hohokam Parkway Advisory Committee, which performed an indepth study regarding a proposed freeway extension through a residential area, and then made recommendations to the Phoenix City Council which had appointed Mrs. Hensel to the committee (Scottsdale, Ex. #3, p.8). She was also appointed by the former Governor of Arizona, Bruce Babbit, to serve as a member of the Arizona Women's Commission from 1978-1981 (Scottsdale, Ex. #3, p. 8). In addition, Mrs. Hensel was a charter member of the Arizona Republican Hispanic Assembly and served as one of its Co-Chairs from 1978-1979 (Scottsdale, Ex. #3, p. 8).

Auxiliary Power

16. Scottsdale will install emergency power generators at its studio and transmitter sites to ensure that the station will be able to remain on the air in the event of a power failure (Scottsdale, Ex. #4).

Conclusions of Law

Diversification

17. Neither Scottsdale, nor its principals Katharine Klein and Randy Baca Hensel has any interests or associations with any medium of mass communications. The Scottsdale application, therefore, is not subject to any diversification demerit.

Best Practicable Service

18. Scottsdale's Articles of Incorporation were filed on December 5, 1983 and its initial directors and incorporators were Elliott K. Klein and Katharine S. Klein (Lyons, Ex. #2; Tr. 301). Scottsdale's original bylaws identify Mr. Klein as President of the corporation (Lyons, Ex. #3; Tr. 303), and Mr. Klein chaired the first meeting of Scottsdale's Board of Directors held on April 15, 1983 (Lyons, Ex. #4; Tr. 305).

19. Scottsdale, while Elliot Klein was still an owner, prepared a counter proposal for submission to this Commission seeking the allocation of channel 290A to Paradise Valley, Arizona (Tr. 278). Elliott Klein, Katharine Klein and another individual, not connected with Scottsdale, subsequently prepared the reply comments (Tr. 280). It was Mr. Klein who suggested hiring Scottsdale's initial and current communications law firm (Tr. 273), and he also suggested hiring Scottsdale's outside engineering counsel (Tr. 413). Scottsdale's third and current local counsel also serves as the attorney for Mr. Klein's consulting company (Tr. 438).

20. Katharine Klein testified that Mr. Klein received his shares of stock in Scottsdale, totalling 20 percent, in return for the engineering work done on the counter proposal and reply thereto referenced above (Tr. 282); and that she also received her shares in the corporation in exchange for services performed for Scottsdale (Tr. 306). Mr. Klein subsequently decided to sell his shares back to the corporation because he was unable to integrate into Scottsdale's management due to the demands and growing success of his consulting business. He formally withdrew from the Corporation in 1984 (Tr. 312-13). At the time this occurred, the Federal Communications Commission had not yet announced a filing window for Paradise Valley, Arizona applications. The corporation was then, simply, a legal entity that might acquire, sometime in the future, an asset worth a considerable amount of money. Mr. Klein's decision to devote his energies to his consulting business and strengthen his wife's chances of securing the Paradise Valley facility by giving up his ownership interest in the applicant, appears to have been a perfectly reasonable and credible action under the circumstances.

21. Elliott Klein, although no longer an owner, continued to be actively involved in the Scottsdale's application. For example, Elliott Klein introduced Scottsdale's principals to his banker (Tr. 340, 568), and he has agreed to provide his personal guarantee for any loan extended to Scottsdale (Tr. 343, 449-50). He also worked with Mrs. Klein in finding a suitable transmitter site (Tr. 346-47) which the Kleins subsequently purchased. He also participated in the preparation of Scottsdale's five year plan (Camelback, Ex. #4), and attended a meeting in July or August 1987 at which the operating costs in this plan were discussed (Tr. 417). Specifically, he prepared the equipment cost guidelines in the plan and participated in the preparation of a portion of the exhibit concerning "other operating expenses" (Tr. 417). He also prepared an update of his earlier engineering memo and gave it to Mrs. Klein without her first requesting it (Tr. 419-21). All expenses paid by Mrs. Klein for the prosecution of this application have come from joint funds owned by Mr. and Mrs. Klein. The question remains, therefore, whether Mr. Klein's actions on behalf of Scottsdale were so extensive as to render meaningless the actions on behalf of the corporation of its two principals, Mrs. Klein and Mrs. Hensel.

22. Mrs. Klein testified that it was always Scottsdale's intention that she, and not her husband (Tr. 308) would be the operator of the station (Tr. 307-308). Although no longer a principal, Mr. Klein continued, however, to be actively involved in prosecuting the application, and agreed to commit funds owned jointly with his wife to the enterprise (Tr. 284, 287, 354, 355-56). In addition, Mr. Klein has agreed in writing to provide his personal guarantee for any loan extended to Scottsdale (Tr. 343, 449-50). Therefore, in addition to assisting his wife and Mrs. Hensel in the prosecution of the application, Mr. Klein, jointly with his wife, has a financial stake in the application.

23. The record demonstrates, however, that Mrs. Klein and Mrs. Hensel have also been actively involved in prosecuting the Scottsdale application. Although Mrs. Klein's husband has performed services for the corporate applicant and has assisted her in the prosecution of the application, Mrs. Klein has not been relegated to the sidelines. Mrs. Klein and her husband secured the transmitter site. She, along with the other shareholder, Mrs.

Hensel, declined Mr. Klein's offer of a loan to the corporation (Tr. 338). Both Mrs. Klein and Mrs. Hensel negotiated and secured the loan commitment for the costs of construction and then operation of the station. Mrs. Klein also gathered demographic information and prepared the non-engineering portion of the counter proposal (Tr. 278). In addition, she participated in the selection of the name of the corporation (Tr. 293-294) and was one of the initial incorporators and directors of Scottsdale (Tr. 301). After Mrs. Hensel became a shareholder, Mrs. Klein and Mrs. Hensel took the corporate files to local counsel to ask him to review and update them if necessary (Tr. 302). It was Mrs. Hensel and Mrs. Klein who decided to hire their present local counsel (Tr. 438) with whom they have both maintained a strong independent relationship separate from local counsel's representation of Mr. Klein's consulting business (Tr. 401, 572). Mrs. Klein and Mrs. Hensel also consulted with a third person, Robin Smith, in preparing a financial plan for the proposed station (Tr. 418). Finally, Mrs. Klein, with funds owned jointly with her husband, and Mrs. Hensel, with her own funds, (Tr. 547) have contributed to financing the project (Tr. 352-53).

24. The Presiding Judge concludes, therefore, that the integration pledges of Mrs. Klein and Mrs. Hensel are credible. Both women, by their past activities, have shown that they are capable of assuming the responsibilities at the station to which they are committed. He further finds that the fact that Mrs. Hensel can be outvoted by the majority shareholder, in this case, Mrs. Klein, and her percentage of total shares in the corporation diluted does not render her integration pledge a nullity.

25. The Presiding Judge concludes, therefore, that Scottsdale is entitled to a 100 percent quantitative integration credit for its proposal to integrate its two principals into the management of its station on a full-time basis. The quantitative integration credit awared Scottsdale for Mrs. Klein's integration proposal is qualitatively enhanced by her local residence since the Fall of 1981 with minor civic involvement, and her gender. Mrs. Hensel's integration proposal is qualitatively enhanced by her hispanic heritage, her gender, and her residence since 1976 within the primary service area of the proposed station with a moderate amount of civic involvement. Mrs. Klein and Mrs. Hensel do not have any prior broadcast experience which would entitle either integration proposal to further enhancement.

26. Scottsdale's application is entitled to a further credit for its proposal to install an auxiliary power source.

GIL L. LYONS

Findings of Fact

27. Mr. Lyons has applied for the proposed Paradise Valley FM station as an individual applicant and sole proprietor (Lyons, Ex. #1).

Diversification

28. Mr. Lyons does not have any interests or associations with any medium of mass communications (Lyons, Ex. #1).

Best Practicable Service

Gil L. Lyons

29. Mr. Lyons proposes to work full-time, a minimum of forty (40) hours a week, as General Manager of the Paradise Valley station (Lyons, Ex. #1). As the sole owner and General Manager, Mr. Lyons will have overall managerial responsibility for and control over all aspects of the station's operations, including programming and the hiring and firing of the station's employees (Lyons, Ex. #1; Tr. 611).

30. Mr. Lyons currently resides in Paradise Valley, Arizona. He has lived at this address, which is located within the 3.16 mV/m contour of his proposed station, since August 1987 (Tr. 589). Mr. Lyons intends to continue to maintain his residence in Paradise Valley while fulfilling his duties at the proposed station (Lyons, Ex. #1).

Auxiliary Power

31. Mr. Lyons proposes to install auxiliary power generating equipment at his studio and transmitter locations (Lyons, Ex. #1).

Conclusions of Law

Diversification

32. Mr. Lyons has no media interests or associations with any medium of mass communications. His application is not, therefore, subject to a diversification demerit of any degree.

Best Practicable Service

33. Mr. Lyons is presently employed by a company, in which he holds one third (1/3) of the outstanding shares of stock, that owns and operates truck stops in New Mexico, Utah, and Pennsylvania (Tr. 593). He is also the company's Secretary/Treasurer and, as such, is indirectly responsible for supervising 400 employees (Tr. 593-94). He also has an ownership interest in a laundromat in College Park, Maryland (Tr. 612), but does not devote any time to that business (Tr. 612). Mr. Lyons has pledged to resign his full-time position with the truck stop operation and sell his shares of stock in the company in the event that his application for the Paradise Valley facility is granted (Tr. 598-99). He indicated further that there is no employment agreement or stock restrictions that would prevent him from fulfilling this pledge (Tr. 597-99, 621).

34. The Presiding Judge concludes, therefore, that there is no evidence of record to indicate that Mr. Lyons present business interests and associations will interfere in any way with his integration commitment to the Paradise Valley station.

35. Joe and John Parker are Mr. Lyons partners in the truck stop operation as well as his partners in the laundromat business (Tr. 595, 614). The Parkers have also joined with Mr. Lyons in filing broadcast applications in the past (Tr. 600-604). Mr. Lyons, however, decided to file this application on his own, although he has discussed the Paradise Valley application with the Parkers since July 1987 (Tr. 599-600), and has had a number of conversations with the Parkers concerning the progress of the application (Tr. 612-13). His conversations with the Parkers have not included the possibility of their acquiring an

ownership interest in the proposed station (Tr. 611-12), nor has he used any funds other than his own in paying the costs of prosecuting his application or received any assistance from the Parkers in preparing and prosecuting his application (Tr. 624, 605, 607). The fact that Mr. Lyons discussed the Paradise Valley application with his business partners, and used the same communication's lawyer that he and the Parkers have used in the past (Tr. 605-06, 622-23), appears perfectly understandable, in view of his long-term relationship with counsel, and does not in any way contradict his claim that this is his application and his alone (Tr. 614-15).

36. Mr. Lyons moved to Paradise Valley, Arizona one month prior to filing his application for the Paradise Valley, Arizona broadcast facility (Tr. 589). Since moving to Paradise Valley, he has spent a significant amount of time traveling outside of Arizona on business (Tr. 590-91). Mr. Lyons has not been involved in civic activities in the Paradise Valley, Arizona area, and he has no prior broadcast experience.

37. The Presiding Judge concludes, therefore, that Mr. Lyons is entitled to a 100 percent quantitative integration credit, qualitatively enhanced by his part-time residence in Paradise Valley, Arizona, and by his announced intention to remain in Paradise Valley, Arizona to fulfill his integration commitment to the proposed station.

38. Mr. Lyons' application is entitled to further credit for his proposal to install an auxiliary power source.

HOPE VALLEY FM LIMITED PARTNERSHIP

Findings of Fact

39. Hope Valley is an Arizona limited partnership (Hope Valley, Ex. #1, p. 1). Hope H. Ozer is the sole general partner with 20 percent of the total partnership's interests in Hope Valley, and B. Scott Reardon III is the only limited partner with 80 percent of the total partnership's interests (Hope Valley, Ex. #1, p. 1).

Diversification

40. Neither Hope Valley nor Mrs. Ozer has any interest in any medium of mass communications (Hope Valley, Ex. #2, p. 1). Mr. Reardon does not presently have any ownership interest in any radio, television or other broadcast facility, or other medium of mass communications (Hope Valley, Ex. #2, pp. 1-2). However, until November 1985, Mr. Reardon owned 100 percent of Sedgwick Broadcasting Co., the licensee of KXLK(FM), Haysville, Kansas (Tr. 910). He sold a 49% interest in Sedgwick in November, 1985 (Tr. 910), and his partner in Sedgwick subsequently acquired an additional one percent interest, giving each partner a 50% ownership interest (Tr. 911). Mr. Reardon subsequently sold his remaining 50 percent ownership interest to his partner in April 1988 (Tr. 911). At the time the Hope Valley application was filed, Mr. Reardon had a 50 percent interest in Sedgwick, the licensee of station KXLK(FM), Haysville, Kansas.

Best Practicable Service

41. Hope Ozer will be integrated on a full-time basis, at least forty (40) hours a week, as General Manager of Hope Valley's proposed station (Hope Valley, Ex. #3, p. 1). As General Manager, Mrs. Ozer states that she will have primary and the ultimate responsibility for all decisions affecting the station's day-to-day and long-range operations (Hope Valley, Ex. #3, p.1).

42. Mrs. Ozer has lived in Paradize Valley, Arizona since December 1984 (Hope Valley, Ex. #3, p. 3; Tr. 654). Shortly after moving to Paradise Valley, Mrs. Ozer became Treasurer of the Cherokee Elementary School Association of Parents and Teachers for the balance of the 1984-1985 school year and for the 1985-1986 school year, and she also served as Chair for Cherokee in an effort to aid the passage of a School District Bond and Budget Override. As President of the Association in 1986-1987, she chaired Cherokee's campaign to pass Proposition 101 to amend the Arizona State Constitution to raise the aggregate spending limit on educational funding. Since 1987, Mrs. Ozer has served as a parent-to-parent liaison, a vehicle by which parents can express concerns and complaints while remaining anonymous. She has also been a board member of Cherokee since 1987 (Hope Valley, Ex. #3, p.3). In addition, Mrs. Ozer between 1986 and 1988 has held a number of volunteer positions on committees concerned with the quality of the district's schools (Hope Valley, Ex. #3, p. 4), and since 1986, Mrs. Ozer has served on the Board of Adjustment for the Town of Paradise Valley, Arizona (Hope Valley, Ex. #3, p. 4). Mrs. Ozer has also been involved with the Scottsdale Parent Council, the Arizona State Department of Education, and Arizona's Educational Excellence Forum. In 1987, she participated in a program entitled "Women and the Political Process" sponsored by the Second Arizona Women's Town Hall. Mrs. Ozer presently serves on the Joint Legislative Committee on Goals for Arizona's Educational Excellence, and she previously served on the Board of Directors of the Scottsdale Prevention Institute as well as worked for the election of certain school board candidates for the Scottsdale School District Governing Board (Hope Valley, Ex. #3, pp. 5-6). She has also been active with the Arizona Citizens for Education, Valley Citizen's League, and Parents Alliance for Legislative Awareness (Hope Valley, Ex. #3, pp. 6-7). In 1989, Mrs. Ozer participated in a conference sponsored by the Arizona Academy, a non-profit civic organization, to discuss a topic of major concern to Arizona's future (Hope Valley, Ex. #3, p. 7).

43. Mrs. Ozer has no prior broadcast experience.

Auxiliary Power

44. Hope Valley will install auxiliary power generating facilities at its studio and transmitter locations (Hope Valley, Ex. #4, p. 1).

Conclusions of Law

Diversification

45. Mr. Reardon is found below not to be an insulated principal. His media interest in an FM radio station in Haysville, Kansas which he held on the B cut-off date in this proceeding and for which no timely divestiture commitment has been made is chargeable to Hope Valley under the diversification criterion.

Best Practicable Service

46. Three weeks prior to the filing of this application, Hope Ozer received a phone call from F. Scott Reardon (Tr. 712). Mr. Reardon, a resident of Sioux Falls, South Dakota, told Mrs. Ozer that he was searching for a local resident with whom to file an application for an FM radio station (Tr. 714-720, Hope Valley, Ex. #1, pp. 2-3). He mentioned to her that he would be strictly an investor and that she would be in control (Tr. 716). Mrs. Ozer did not know Mr. Reardon prior to that phone call; her name had been given to Mr. Reardon by a contact in the Paradise Valley area. Mrs. Ozer, accompanied by her husband, met with Mr. Reardon on August 22, 1987, the only meeting Mrs. Ozer has had with Mr. Reardon. He provided her with personal references, including the name of Tom Siebert who is associated with the firm that now represents Hope Valley, and Mrs. Ozer provided Mr. Reardon with her references. She did not ask nor was she told how Mr. Reardon would meet his financial obligations to the partnership, and she has never seen a personal balance sheet for Mr. Reardon (Tr. 675, 740-44). She has, however, seen a copy of the bank commitment letter upon which Hope Valley relies for the funds to pay the construction and operating costs of its proposed station.

47. Mrs. Ozer retained Mr. Siebert, on Mr. Reardon's recommendation (Tr. 844-46), and Mr. Siebert, in turn, referred Mrs. Ozer to a consulting engineer and another consultant, Stan Karas, who prepared a construction and operating budget upon which she relied in certifying Hope Valley's financial qualifications. Mrs. Ozer retained the engineer and Mr. Karas during the course of a telephone conference without meeting them or checking their references (Tr. 744-45).

48. Mr. Reardon provided Mrs. Ozer with a draft limited partnership agreement (Tr. 661). According to Mrs. Ozer's testimony, her local counsel dealt directly with Mr. Reardon in negotiating modifications in the agreement (Tr. 659-60, 848). Mrs. Ozer's attorney added language to the agreement to the effect that she would not be required to contribute additional capital to the partnership except as provided for in Section 2.7 (see Section 2.2); and there is no express requirement in the agreement that Mrs. Ozer make or meet additional capital calls, or that she contribute additional funds to the enterprise unless Mr. Reardon does so as well. If Mr. Reardon vetoes a capital call, Mrs. Ozer can add additional limited partners (see Section 7.4(b)). However, Section 7.4(a) of the Hope Valley Limited Partnership Agreement requires approval by a majority of each of the general partnership and limited partnership's interests before that can be done (Hope Valley, Ex. #5, p. 14). The partnership, not Mrs. Ozer, is responsible for all expenses (Hope Valley, Ex. #5, p. 10), and Mrs. Ozer is not personally obligated to repay loans to the partnership by Mr. Reardon (see Section 2.5; Hope Valley, Ex. #5, p. 4). A general partnership interest commonly carries with it absolute liability. This departure from what is expected raises serious questions as to the *bona fides* of this arrangement

49. Under the terms of the agreement, Mr. Reardon can refuse to fund 85 percent of the operative costs, and Mrs. Ozer cannot seek additional capital contributions without first consulting with Mr. Reardon. Unless Mr. Reardon agrees that further contributions are necessary, none can be required, and Mrs. Ozer cannot circumvent his veto by making unilateral capital contributions. It appears clear, therefore, that Mrs. Ozer would have to yield to Mr. Reardon's views as to how funds should be spent in order to assure his continuing support. Mr. Reardon has additional leverage over Mrs. Ozer under Section 4.5 of the agreement which provides that she cannot leave the partnership without his consent. In contrast, Mrs. Ozer's right to disapprove transfer of Reardon's limited partnership's interest, under Article 7, is essentially nullified by the requirement that her assent not be unreasonably withheld or delayed.

50. Section 2.2 of the limited partnership agreement provides that Mrs. Ozer shall serve in such management-level positions as the partnership may from time-to-time determine (Hope Valley, Ex. #5, p. 3). The partnership, as defined by the agreement, see paragraph B in the Recitals section, and by Mrs. Ozer (Tr. 670) includes both Mrs. Ozer and Mr. Reardon. Although Mrs. Ozer denied that Mr. Reardon will have any input as to what her management position would be, she admitted that the foregoing provision might be understood to vest such authority in Mr. Reardon (Tr. 670-71). Section 2.3 of the partnership agreement provides that the limited partners shall have no role in the management of the radio station (Hope Valley, Ex. #5, p. 4), Section 4.1 of the Agreement vests in Mrs. Ozer the exclusive right to manage partnership business (Hope Valley, Ex. #5, p. 6), and Section 4.6 prohibits the limited partner from performing any services for the limited partnership materially relating to the radio station, such as becoming actively involved in management or operation of the station, becoming an employee thereof, and performing any services as an independent contractor or agent with respect to the partnership's station (Hope Valley, Ex. #5, p. 8).

51. However, the agreement prior to November 29, 1988 did not prohibit the limited partners from communicating with the general partner on matters relating to the day-to-day operations of the partnership's business (Hope Valley, Ex. #5, pp. 33-34). Although, it has now been amended to include such a provision, the amendment was filed after the deadline for filing amendments as a matter of right, and it will not be considered since to do so would constitute an impermissible comparative upgrade.

52. Mr. Reardon is an experienced broadcaster. Mrs. Ozer has no broadcast experience and has not held a full-time job for more than a decade. Nevertheless, Hope Valley would have us believe that Mrs. Ozer has been and will remain in control of an enterprise in which she has limited liability, and that Mr. Reardon, who is the source of 85 percent of the funds required for prosecuting the application as well as the guarantor of the funds for the construction and operation of the station, is merely a passive investor. The record clearly demonstrates that Mr. Reardon was the prime mover in creating and funding the partnership. He chose Hope Valley's communications counsel, who in turn recommended Hope Valley's engineer and broadcast consultant. Mrs. Ozer's total reliance on Mr. Reardon's assurances that he would provide the necessary funding supported, simply, by a bank letter without inquiring into his other financial commitments or the general state of his finances does not give any assurance that she is in total control of the enterprise. The Presiding Judge specifically finds, therefore, that Mr. Reardon's ability to control the finances of Hope Valley, his active involvement from the very beginning in setting up the applicant by selecting the general partner, commu-

nications counsel and, indirectly, the engineer and broadcast consultant precludes a finding that he is a properly insulated principal whose equity interest is shielded from consideration in determining the percentage of quantitative integration credit to which Hope Valley is entitled. The fact that Mrs. Ozer has been actively involved in a number of ways in prosecuting the application, including preparing Hope Valley's program service statement, collecting information for the E.E.O. program, helping select the transmitter site, establishing Hope Valley's public inspection filed, and maintaining Hope Valley's business records does not demonstrate that she alone is in control of the applicant but merely that she has been an active participant in prosecuting this application. Hope Valley is, therefore, entitled to a quantitative integration credit in an amount that equals Mrs. Ozer's equity interest in the applicant.

53. The Presiding Judge concludes, therefore, that Hope Valley is entitled to a quantitative integration credit of 20 percent which represents Mrs. Ozer's equity interest in Hope Valley, qualitatively enhanced by Mrs. Ozer's residence in Paradise Valley, Arizona with some civic involvement and by her gender.

54. Hope Valley's application is entitled to further credit for its proposal to install an auxiliary power source.

PATRICIA HAMPTON

Findings of Fact

55. Patricia Hampton is a sole proprietor.

Diversification

56. Ms. Hampton has no interests, attributable or nonattributable, in any medium of mass communications (Hampton, Ex. #1).

Best Practicable Service

57. Ms. Hampton will be integrated on a full-time basis, at least forty (40) hours a week, into the operation and management of her proposed station as General Manager. In that role, she will have specific responsibility for hiring and supervising the station's staff, establishing the station's sales projections, goals, and pricing policies, overseeing the station's programming, and monitoring and supervising the station's financial matters (Hampton, Ex. #1). In addition, Ms. Hampton will perform the duties of a sales manager (Tr. 943).

58. Ms. Hampton has lived in Scottsdale, Arizona, which is immediately adjacent to Paradise Valley, since 1986 (Tr. 929). Scottsdale is within the 60 dbu contour of the proposed station (Hampton, Ex. #1).

59. Ms. Hampton has no prior broadcast experience.

Auxiliary Power

60. Ms. Hampton will provide auxiliary power at the studio and transmitter sites in order to maintain continuous service in the event of an interruption of electrical power (Hampton, Ex. #2).

Conclusions of Law

Diversification

61. Ms. Hampton does not have an ownership interest or association with any medium of mass communications. Her application is, therefore, not subject to a diversification demerit.

Best Practicable Service

62. Ms. Hampton has been engaged in the sale and manufacture of tanning and other skin care products for 18 years. She is the sole owner of the company, and it is her sole support. Ms. Hampton has indicated, however, that she will sell the business, in the event that she is the successful applicant, and she mentioned that she already has an oral contract for the purchase of the company (Tr. 926). She is also the sole owner of PC Image Making, a video imaging business (Tr. 923-24), but spends no time managing the business. It does not appear, therefore, that Ms. Hampton has any outside business interests or associations that will interfere in any way with her full-time commitment to the proposed station.

63. A friend of Ms. Hampton's, Carl Como Tutera, told her about the availability of the Paradise Valley, Arizona facility (Tr. 927-28). Mr. Tutera, at the time, owned station KGRK-FM, Globe, Arizona whose service area overlaps that of the proposed Hampton station as well as additional broadcast facilities in Florida, Arizona, New Mexico and Tennessee. Ms. Hampton testified that she has spoken to Mr. Tutera a number of times (Tr. 928-29, 932-34, 959-61, 993-94); and that he referred her to his law firm, Pepper and Corazzini, as well as to his consulting engineering firm, both of which she ultimately retained (Tr. 930-35). Mr. Tutera has not advanced any monies to Ms. Hampton for the prosecution of her application (Tr. 930-31). Ms. Hampton has been actively involved in prosecuting her application. She contacted equipment suppliers in order to estimate the cost of constructing the station and operating it for three months without revenues and received written estimates from them (Tr. 936-37). She also personally developed a staffing plan (Tr. 937) and an E.E.O. program (Tr. 940), and she worked with a real estate agent in obtaining Hampton's transmitter site (Tr. 942-43), and then secured an option letter to purchase the site (Tr. 943). Ms. Hampton also selected her communications counsel (Tr. 930), and has paid the costs of prosecuting her application from her own funds (Tr. 970-71). The record is devoid of any evidence which refutes Ms. Hampton's claim that she has been and is in complete control of the enterprise. Similarly, no doubts have been raised about her pledge to remain in complete control of the applicant and, if successful, the broadcast facility in Paradise Valley, Arizona. The Presiding Judge finds, therefore, that Ms. Hampton's full-time integration pledge is completely credible.

64. Ms. Hampton is a resident of her station's proposed service area. Since she did not assert a timely claim for civic activities within the area (Tr. 919, 920), her credit for local residence is not subject to enhancement for active participation in civic affairs within the community. Furthermore, although Ms. Hampton is a present resident of Scottsdale, she did not pledge to continue to reside there in the event that her application for the Paradise Valley facility is granted. Although she is committed to work full-time at the station in a number of roles, conceivably these responsibilities could be met even though

she no longer lived within the proposed station's service area. Therefore, Ms. Hampton will not receive any credit for future residence within the service area. However, her full-time integration credit is qualitatively enhanced by past and present residence within the service contour of her proposed station and by her gender.

65. Ms. Hampton's application is entitled to a further credit for her proposal to install an auxiliary power source in case of a power failure.

JULIA S. ZOZAYA D/B/A AMERICAN INTERNATIONAL DIVERSIFIED

Findings of Fact

66. A.I.D. is a sole proprietorship of Julia S. Zozaya (A.I.D., Ex. #1, p. 1).

Diversification

67. At the time Mrs. Zozaya filed her application, she held a one (1) percent ownership interest in Seven Hills Television, the licensee of UHF television station KTVW, Phoenix, Arizona which she has timely agreed to divest in the event that A.I.D. is the successful applicant (A.I.D., Ex. #2).

Best Practicable Service

Julia S. Zozaya

68. Mrs. Zozaya proposes to serve as A.I.D.'s General Manager, devoting at least thirty (30) hours a week to her duties at the station (A.I.D., Ex. #3, p. 1). She will have overall responsibility for managing the proposed station, determining all station policy and supervising all station employees through appropriate management personnel. She will also develop and administer the station's equal employment opportunity program (A.I.D., Ex. #3, p. 1).

69. Mrs. Zozaya has been a service area resident since 1955 and has been involved to a significant degree in civic activities in the Phoenix, Arizona area.[2] She does not claim a prospective local residence credit because she is committed to relocate to Flagstaff, Arizona in the event that she receives a grant for channel 261C2, Flagstaff, Arizona (A.I.D., Ex. #3, p. 1), and to spend forty (40) hours a week managing the Flagstaff station (A.I.D., Ex. #3, p. 1).

70. Mrs. Zozaya has been involved in broadcasting since 1972 (A.I.D., Ex. #1, p. 1). Her past broadcast experience includes developing and airing a 15 minute weekly talk show, as well as serving as the President as well as the General and Sales Manager of a Phoenix FM radio station (A.I.D., Ex. #1, p. 1).

Auxiliary Power

71. A.I.D. proposes to install an auxiliary transmitter and generator to ensure continued station operations in the event of a power loss (A.I.D., Ex. #4).

Conclusions of Law

Diversification

72. Mrs. Zozaya has no chargeable media interests. Her application, therefore, is not subject to a diversification demerit.

Best Practicable Service

73. As shown above, A.I.D.'s integration proposal calls for Mrs. Zozaya to devote at least 30 hours a week to her duties at the proposed station. This commitment is in addition to a forty (40) hour a week commitment that she made to a proposed station in the Flagstaff, Arizona (MM Docket No. 88-275) (A.I.D., Ex. #3). Although she proposes to live in Flagstaff, Arizona, she will fulfill her pledge to the Paradise Valley, Arizona facility, by being present, physically, at the Paradise Valley station one day a week, and by devoting the hours between 6 a.m. and 10 a.m. each week day to the handling of Eastern Time Zone matters for both stations with at least half that time spent on Paradise Valley's business, and the hours between 5:00 p.m. and 8:00 p.m. every day would be given over exclusively to the management of the Paradise Valley's station (A.I.D., Ex. #3, pp. 1-2; Tr. 1038-43). In addition to this 70 hour pledge to the two stations, Mrs. Zozaya will continue to participate in her Phoenix, Arizona civic activities which require more than 25 hours of her time a week (A.I.D., Ex. #3, p. 1; Tr. 1044). The six to nine hours a week that she currently spends on personal and family matters would be assumed by her husband (Tr. 1046).

74. The total number of hours, including the 25 hours spent on civic activities, which Mrs. Zozaya has committed herself to amounts to a grand total of 95 hours. It is noted that no allowance has been made for meals or for travel time between Paradise Valley and Scottsdale, Arizona which Mrs. Zozaya indicated would require four hours of driving time in good weather (A.I.D., Ex. #3, p. 1). Judge Frysiak, after taking notice of her integration pledge in this proceeding, found in the Flagstaff, Arizona proceeding that such a total time commitment for a blind woman in her sixties was unrealistic, and he denied her any integration credit (see 4 F.C.C. Rcd. 6271). His finding has been affirmed by the Review Board, *Julia S. Zozaya*, 5 F.C.C. Rcd. 856 (R.B. 1990). The undersigned concludes that Judge Frysiak's finding applies equally as well here, and that Mrs. Zozaya's integration pledge of 30 hours a week is inherently implausible and, on the basis of this record, A.I.D. cannot be awarded an integration credit in any amount since it is impossible to reach a conclusion as to how many hours, if any, Mrs. Zozaya will be able to spend in managing the Paradise Valley facility.

75. In the event, however, that it is determined, on review, that Mrs. Zozaya is entitled to a part-time integration credit, that credit would be qualitatively enhanced by her minority status, her gender, her long-term residence within the service contour of her proposed station with a significant amount of civic involvement, and, finally, her past broadcast experience.

76. A.I.D.'s application is entitled to further credit for its pledge to install an auxiliary power source.

PHILIP C. DAVIS AND LISA M. DAVIS D/B/A PARADISE VALLEY BROADCASTERS

Findings of Fact

77. PVB is an Arizona general partnership comprised of Philip C. Davis and Lisa M. Davis (Davis) (PVB, Ex. #1, p. 1). Philip Davis and Lisa Davis each own a 50 percent general partnership interest in PVB, and they claim that they will have an equal right to manage the affairs of the partnership (PVB, Ex. #1). The Davises, who are husband and wife, entered into an oral general partnership agreement prior to filing the PVB application on September 10, 1987 (Tr. 1095, 1105, 1126, 1189, 1197). The written PVB General Partnership Agreement was signed by the Davises on December 1, 1988, prior to the filing of Integration and Diversification Statements in this proceeding on December 5, 1988 (Tr. 1103-04).

Diversification

78. Philip C. Davis has a 8.3 percent beneficial interest in the M. Philip Davis Trust (PVB, Ex. #2, p. 1). The Trust holds a 57.473 percent general partnership ownership interest in the licensee, KLOK Radio, Ltd. (Tr. 1164), of stations KFIG-AM and FM, Fresno, California (PVB, Ex. #2; Tr. 1213, 1232). The general partner, KLOK Radio, Ltd., has the right to dispose of the stations without the concurrence of any limited partner (A.I.D., Ex. #6, Section 7, p. 4). Philip Davis, who has an 8.3 percent beneficial interest in the M. Philip Davis Trust (PVB, Ex. #2, p. 1), therefore, holds a 4.77 percent beneficial interest in the licensee of stations KFIG-AM and FM, Frenso, California, through the Trust. In addition, Philip Davis owns a 7.083 percent limited partnership interest in the licensee, KLOK Radio, Ltd. Philip Davis' ownership interest in KFIG-AM and FM, including his beneficial trust interest and his limited partnership interest, amounts to an 11.853 percent minority ownership interest.

79. Philip Davis and his sister, Barbara Holland, are co-trustees of the M. Philip Davis Trust (Tr. 1210). The Trust provides that Philip Davis has sole authority to manage the broadcast properties of the Trust (Tr. 1200, 1210, 1244-45) and he has the authority, as Trustee, to sell the stations under the applicable partnership and trust documents (Tr. 1210, 1213); A.I.D., Ex. #6 and 7; PVB, Ex. #10). Mr. Davis has pledged to divest all ownership interests in KFIG-AM and FM, in the event of a grant herein by causing KLOK Radio, Ltd., the licensee, to sell its stations (PVB, Ex. #2, p. 1; Tr. 1210, 1213).

Best Practicable Service

Philip Davis

80. Mr. Davis proposes to serve on a full-time basis, as General Manager of the station (PVB, Ex. #2, p. 2). He will have primary responsibility for supervising the production and engineering staffs (PVB, Ex. #2, p. 2).

81. Mr. Davis has maintained a residence in Paradise Valley continuously since 1974. Between 1986 and 1988, he spent between three to four days a week in San Francisco, California in connection with his responsibilities as Trustee of the M. Philip Davis Trust for the stations KLOK-AM and FM, and three to four days a week at his home in Paradise Valley, Arizona (PVB, Ex. #2, p. 2; Tr. 1094, 1096).

82. Mr. Davis claims broadcast managerial responsibilities continuously since 1967 (PVB, Ex. #2, pp. 3-4).

Lisa Davis

83. Mrs. Davis states that she will serve as Station Manager, on a full-time basis, at PVB's proposed station, and that she will share, along with her husband in the supervisory responsibilities at the station (PVB, Ex. #3, p. 1), wile having primary responsibility for the sales and the administrative staffs (PVB, Ex. #3, p. 1).

84. Mrs. Davis has resided in Paradise Valley, Arizona continuously since 1974. Like her husband, she spent between three and four days a week in San Francisco between 1986 and 1988, and three to four days a week at her home in Paradise Valley, Arizona (PVB, Ex. #3, p. 2; Tr. 1094, 1096).

85. Mrs. Davis claims broadcasting experience from 1966-1969 and since 1974 (PVB, Ex. #3, p. 2).

Auxiliary Power

86. PVB proposes to install at its studio and transmitter sites an auxiliary power source to be used in the event of a power failure (PVB, Ex. #4).

Conclusions of Law

87. Philip Davis is the trustee for the M. Philip Davis Trust. The Trust, among other properties, owns broadcast facilities. As trustee, Mr. Davis has sold certain broadcast stations owned by the Trust, since the date of the filing of Paradise Valley's application (see *Order* FCC 88M-3879, released November 16, 1988), and he has made efforts to sell the other stations in which the Trust has an ownership interest. There is no evidence of record to indicate that his announced intention to sell all of the Trust's broadcast properties cannot be effectuated. Accordingly, the Presiding Judge concludes that Paradise Valley has no chargeable media interests, and its application is not subject to a diversification demerit.

Best Practicable Service

88. Paradise Valley claims a 100 percent quantitative integration credit based on its proposal to integrate on a full-time basis, its two principals, Philip and Lisa Davis, into the affairs of its station in management level positions. The evidence of record demonstrates, however, that Mrs. Davis participation and involvement in the prosecution of this application has been minimal at best, if not non-existent, and that Mr. Davis has done virtually everything in connection with the application. Mr. Davis himself testified that he had overall responsibility for all matters concerning the application (Tr. 1257); a statement confirmed by Mrs. Davis who indicated that there were no areas of the application for which she had primary responsibility (Tr. 1146). Although Mrs. Davis discussed the programming service statement with her husband, he composed it (Tr. 1152-53). Mr. Davis' testimony to the effect that his wife had been involved in preparing cost estimates for the station was contradicted by Mrs. Davis, who indicated that she did not prepare the estimates and only became aware of them after the application was filed (Tr. 1151).

89. Mrs. Davis' role in the application process appears to have been similar to that which she has assumed in the past with respect to her husband's other business respon-

sibilities. At meetings held at stations owned by the Trust, Mrs. Davis described herself as merely an observer (Tr. 1138). Her involvement with Trust properties, stations KWIZ AM/FM, Santa Ana, California in 1976 and 1977 was limited to visits totalling only six days per year (Tr. 1121) and, although the number of visits to the Trust's stations increased in 1978-80, they did not exceed 18 days per year (Tr. 1122). Mrs. Davis also claims responsibility for negotiating a trade agreement at a station owned by the Trust; however, she conceded, on further examination, that the actual terms of the trade agreement had been negotiated by her husband (Tr. 1125). Finally, the record shows that Mrs. Davis has not held a position at any broadcast station since 1969, and has not been employed outside the home since 1974 (Tr. 1130).

90. During the years since 1974, Mrs. Davis has traveled with her husband, observed meetings, and occasionally performed secretarial tasks for her husband in connection with his role as Trustee of the M. Philip Davis Trust. Her participation in the application process to date appears to mirror her role since 1974 with respect to the Trust's broadcast properties, and is predictive of the role she would assume at the proposed Paradise Valley broadcast facility.

91. Mrs. Davis' past conduct, as well as her description of the duties she will perform at the proposed station, involve largely secretarial and other administrative duties, and they do not reflect that she will share in setting and implementing station policy, or that she will be actively involved in the actual management of the station apart from serving as an assistant to her husband. The record, viewed as a whole, therefore, requires a finding that Mrs. Davis will not serve in a managerial capacity at the proposed station, and that her integration proposal is not entitled to an integration credit.

92. Mr. Davis, however, will assume managerial responsibilities at the station, and there is no evidence of record to dispute his claim that he will be integrated into the management of the station on a full-time basis, at least forty (40) hours a week. Paradise Valley, therefore, is entitled to a 50 percent quantitative integration credit which represents Mr. Davis' equity interest in the applicant. This credit is qualitatively enhanced by Mr. Davis past residence in the city of license. The record indicates, however, that during the period between 1986 and 1988 which includes the date the Paradise Valley application was filed, Mr. and Mrs. Davis were spending four days a week in San Francisco, California (Tr. 1094, 1096), commuting back to their residence in Paradise Valley, Arizona each week (Tr. 1094, 1203). Prior to 1986 and from 1974, they lived full-time in Paradise Valley, Arizona.

93. Mr. Davis' part-time residence in the city of license, at the time his application was filed entitles his application to less than full-time residence enhancement. However, in view of the fact that Mr. Davis was a full-time resident of Paradise Valley, Arizona for in excess of 10 years prior to 1986 and intends to reside in Paradise Valley, Arizona on a full-time basis in the future, the credit for local residence awarded Mr. Davis' integration proposal is only slightly less than it would be if he had been a full-time resident as of the date of the filing of the application. Although Paradise Valley claims civic involvement within the proposed service area on behalf of both Mr. and Mrs. Davis, it appears from the evidence of record that both individuals merely donated money to civic groups in the Scottsdale area without any active participation in these organizations' activities (Tr. 1131-32, 1117, 1173, 1179-80). Their claims for civic enhancement are denied.

94. Mr. Davis states that he has held corporate and partnership positions in the broadcast entities owned and controlled by the Davis Trust (PVB, Ex. #2, p. 4). However, because of a lack of any specificity as to the nature of these positions, it is unclear the extent to which, if at all, Mr. Davis actually held managerial responsibility at these stations. Therefore, based on the evidence of record, the only broadcast experience for which Paradise Valley's proposal can receive credit occurred between 1964 and 1967 when Mr. Davis served as General Manager at a station in Newport Beach, California. His testimony at the hearing to the effect that he was General Sales Manager at the Davis Trust's Fresno, California stations KFIG-AM and FM from January 1989 to January 1990 (Tr. 1166) is clearly untimely and, if accepted would constitute a comparative upgrade and it will not be considered. Similary, no notice will be taken of his promotion to General Manager at these stations, effective January 15, 1990. *See Order* (FCC 91M-890, released on March 8, 1991).

95. From 1966-69, Mrs. Davis worked full-time at KWIZ AM and FM, Santa Ana, California as a receptionist, typist and file clerk, and she also assisted with the public service announcements, promotions, and traffic (PVB, Ex. #3, p. 2). Mrs. Davis did not supervise any employees (Tr. 1140). Her positions at these stations are best described as secretarial. Therefore, if her integration proposal had been credited, it would not have been entitled to further enhancement for past broadcast experience. Her proposal would, however, like her husband's, receive qualitative enhancement for residence within the city of license similar to that given to her husband's proposal and to a further enhancement for her gender.

96. Paradise Valley's application is entitled to a further credit for its proposal to install an auxiliary power source at its studio and transmitter locations to ensure continued broadcast service in the event of a power failure.

COMPARATIVE COVERAGE

97. The following are the total areas and populations as set forth in Joint Exhibit I, which each applicant will cover within their respective 1 mV/m contours:

Applicant	Area (sq. km.)	Population
Scottsdale Talking Machine and Wireless Co., Inc.	1,553	1,139,295
Gil L. Lyons	1,297	1,119,316
Hope Valley FM Limited Partnership	1,641	1,105,219
Patricia Hampton[3]	1,548	1,208,943
Julia S. Zozaya d/b/a American International Diversified	1,334	879,918
Philip C. Davis and Lisa M. Davis d/b/a Paradise Valley Broadcasters	752	583,492

98. None of the applicants will provide service to any underserved areas (Joint Exhibit I).

99. Based on the figures set forth above, Scottsdale merits a slight preference over Paradise Valley, a very slight preference over A.I.D., and no preference in com-

parison with Lyons, Hope Valley or Hampton. Similarly, Lyons, Hope Valley and Hampton each merit a very slight preference over A.I.D., but no preference as to each other.

ULTIMATE CONCLUSIONS

100. Paradise Valley, Zozaya and Hope Valley have all been found to propose 50 percent or less integration of ownership into management. The remaining three applicants, Scottsdale, Mr. Lyons and Ms. Hampton are all entitled to a 100 percent quantitative integration credit. Since Paradise Valley, Zozaya and Hope Valley are not entitled to any preference under the diversification criterion over either Scottsdale, Mr. Lyons or Ms. Hampton, their proposals are clearly, comparatively speaking, inferior to these three applications, and they will not be considered further. Of the remaining three applicants, the qualitative enhancements to which Scottsdale is entitled places it substantially above both Mr. Lyons and Ms. Hampton's proposals. It alone among the three applicants has 100 percent of its ownership composed of long-term residents of its proposed service area, with 60 percent of that ownership entitled to a credit for long-term residence within the city of license, and all 100 percent of its integrated ownership committed to continue to live with the proposed service area. This long-term residence credit is further enhanced by a slight to moderate degree of involvement in civic affairs within the service area. In addition, 40 percent of its quantitative integration credit is entitled to a minority enhancement and 100 percent to a gender preference. As noted above, Mr. Lyons is just a short-term, part-time resident of Paradise Valley, Arizona with no civic involvement. Ms. Hampton is also just a very recent resident and, furthermore, has not made a commitment to remain in the area. The only additional enhancement to which either of these two principals is entitled is a gender preference for Ms. Hampton. Scottsdale, Mr. Lyons and Ms. Hampton are all on an equal footing under the comparative coverage criterion with neither entitled to any preference. Based on the analysis set forth above, the Presiding Judge concludes that Scottsdale's proposal will best serve the public interest and its application will be granted.

RULINGS

101. ACCORDINGLY, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Scottsdale Talking Machine and Wireless Co., Inc. (File No. BPH-870909MF) for authority to construct a new FM station or channel 290A in Paradise Valley, Arizona IS GRANTED; and that the applications of Gil L. Lyons (File No. BPH-870910MC), Hope Valley FM Limited Partnership (File No. BPH-870910ME), Patricia Hampton (File No. BPH-870910NE), Julia S. Zozaya d/b/a American International Diversified (File No. BPH-870910NH), and Philip C. Davis and Lisa M. Davis d/b/a Paradise Valley Broadcasters (File No. BPH-870910NK) ARE DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTES

[1] The application of Camelback Radio Broadcasters, L.P. was dismissed with prejudice pursuant to *Order* FCC 89M-2734, released in this proceeding on December 6, 1989; the application of Paradise Valley Associates Limited Partnership was dismissed with prejudice by *Order* FCC 88M-4017, released on November 23, 1988; and that of Paradise Valley Broadcasters Ltd. Partnership I by *Order* FCC 89M-535, released on February 15, 1989.

[2] Julia Zoyaya was involved in the following regional, state, and civic organizations:

Arizona Academy of Town Halls - Board Member - 1976-1978

Arizona Association of VICA (Vocational/Industrial Clubs of America) 1982

Arizona Council of Churches - Migrant Committee - 1973-1975

Arizona Hispanic Chamber of Commerce

(formerly Arizona Mexican American Chamber of Commerce) -

Incorporating Officer 1973

Board Member 1973-1978

President 1976, 1978

Arizona Mexico Commission - 1985

Arizona Hispanic Community Forum - 1986

Arizona Hispanic Women's Corp. - 1982

Arizona Rehabilitation Association - 1970-1976

Association Nacional pro Persones Mayores - 1971-1979

Organizer and charter member ABRAZAR (founder) 1974-1978

Central Arizona Health Systems Agency - Board Member - 1976-1979

Chicanos por la Causa

Member from 1975 to the present

Colorado River Pioneers Historical Society - Director - 1987

Consejo (now defunct) - Vice Chairman - 1965-1967

League of Mexican American Women - 1968-1972

Charter Member

Legislative and Publicity Chairman

Disability Network of Arizona - 1988

Human Rights of Arizona - 1966-1978

Board Member 1971-1978

White House Reorganization Committee 1977

Special Health Care Task Force 1978

LULAC (League of United Latin American Citizens) 1965

Arizona Newsletter Editor 1972

National Vice President for Women 1970, 1972

S.E.R. Jobs for Progress, Inc. 1982

States Director 1988

State Publicity Chairman 1968

National Chairman Women's Affairs Committee 1971-1973

National Chairman Senior Citizens' Affairs Committee 1971-1974

Motivation of Arizona, Inc. - 1967-1969

Melvin Jones Center for the Blind - mid 1960's to early 1970's

Board Member

Personnel Committee

MUJER, Inc. - 1982-1986

National Association for Community Development - 1968-1972

National Hispanic Chamber of Commerce - 1965-1980

Founder

Regional Vice President 1975-1977

National Intergroup Relations Association - 1967 - 1970

National Volunteers Organization for Independent Living - 1971-1978

President 1971

National Federation of the Blind - 1960-1967

First Vice President 1965

Legislative Chairperson 1967

Ways & Means Chairperson 1966

Program Chairman 1967

Public Relations Chairperson 1960-1964, 1967

Sun Sounds - 1979 to present

Community Development Board, current member

Organizing Committee 1978-1979

Vesta Club - 1965

Publicity Chair 1965-1966

Zenith Club (now Arizona Federation of the Blind) - 1964-1967

First Vice President 1965-1967

Publicity Chairman 1964-1967

Ways and Means Committee Chair 1964-1966

National Community Resource Center - 1975-1978

National Spanish Speaking Health Opportunities Organization 1967-1971

Pan American Club - 1960's

Phoenix Forward Task Force - 1973-1975

Phoenix Indian Center - 1966

Developed initial proposal for Center 1966

Co-chair Bylaws Committee 1966-1973

Community Relations Liaison 1966-1973

Co-chair Membership Committee 1967-1973

Co-chair Board of Directors 1968

Since 1973, when Board became all Indian, has worked as an informal advisor

Phoenix Metropolitan Chamber of Commerce

Board Member 1975-1976, 1978-1979

Salvation Army Community Forum - 1971-1972

South Phoenix Economic Development Center - 1968-1970

United Valley Volunteers/Volunteer Bureau of Maricopa County

Committee Member 1961-1968

Teacher's Aide 1965-1968

Board Member 1969-1971

Valley Big Sisters - 1967

VFW Post 385 Women's Auxiliary - 1961

Women in Community in Service National Board - 1972-1974

World Affairs Council - 1974-1978

YWCA 1973

Community Education Forum, committee member

List of state and federal advisory groups that Julia Zozaya has been appointed to:

Advisory Committee to the United States Secretary of Labor on Rights and Responsibilities of Women - 1972-1975

Consultant to Special Senate Committee on Aging - 1970-1973

Governor's Commission on the Blind and Visually Impaired - 1986

Governor's Committee on Employment of the Handicapped - 1971

Board Member 1983

National Advisory Board to Women's Bureau, United States Department of Labor - 1971-1973

National Bicentennial Advisory Council - 1975-1977

National Council on Aging, Inc. - 1972, 1975

Phoenix Arts Commission - 1988

President's Committee on Employment of the Handicapped - 1971-1978 (still serves as resource person)

State Advisory Council on Vocational-Technical Education - 1980-1982

Sun Sounds Community Advisory Board - 1986

White House Conference on Aging - 1971

White House Conference on Small Business - 1980

[3] By *Memorandum Opinion and Order* FCC 89M-2268, released on September 5, 1989, Hampton's amendment to change her transmitter site was accepted. Hampton's amended site and facilities are identical to those proposed by Hope Valley. The area and population noted above represent the lesser of Hamp-

ton's original and amended proposals. The lesser figure for both the area and population are referenced in order to avoid any comparative upgrades.

[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-601

In the Matter of

Amendment of Section 73.202(b), RM-6505
Table of Allotments,
FM Broadcast Stations.
(Johannesburg, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 13, 1991; Released: March 25, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 4 FCC Rcd 786 (1989), setting forth a petition for rule making filed by Robert Adelman ("Adelman"), permittee of Station KRAJ, Channel 280A, Johannesburg, California. The petition for rule making proposes the substitution of Channel 280B1 for Channel 280A at Johannesburg, and modification of the Station KRAJ construction permit to specify operation on Channel 280B1. Adelman and Inland Empire Broadcasting Corporation filed comments.[1] Bel Air Broadcasting Corporation, licensee of Stations KZIQ and KZIQ-FM, Ridgecrest, California, filed a Motion for Leave to File Comments and Comments.[2] Adelman filed a Supplement to Comments, a Motion for Extension of Time, an Opposition to the Bel Air Broadcasting Corporation Motion for Leave, and a Reply to Bel Air's comments. Bel Air filed a reply. Adelman also filed a further supplement to his reply. For the reasons discussed below, we grant the proposed Channel 280B1 upgrade at Johannesburg, California.

2. This matter began with the filing of an application by Adelman for the Channel 280A allotment at Johannesburg, California (File No. BPH-850712MY).[3] Pursuant to a settlement agreement by which Adelman would seek to modify his construction permit to specify the transmitter site proposed in a competing application, this application was granted on August 28, 1986. On July 27, 1987, Adelman filed an application to modify his construction permit to specify a different site which was approximately 10 miles north of Johannesburg. At this site, the proposed station would not provide the requisite 70 dBu signal to Johannesburg as required by Section 73.315(a) of the Rules. This application was dismissed on February 11, 1988. Thereafter, the construction permit for Station KRAJ was issued specifying the transmitter site originally proposed by Adelman.

3. On August 30, 1988, Adelman filed his petition for rule making proposing the Channel 280B1 upgrade. As noted by Bel Air Broadcasting Corporation ("Bel Air"), that petition for rule making proposed a set of coordinates for the Channel 280B1 allotment different from any coordinates proposed in any of his previous applications for the Class A allotment at Johannesburg.[4] Thereafter, on August 2, 1989, Adelman filed an application to modify his Class A construction permit to specify an alternate site (File No. BMPH-890802IE), and later filed a Supplement to his comments in this rule making proceeding to specify the same site.[5] That site would permit Station KRAJ to operate as a Class A station at the equivalent of 6 kilowatts in accordance with the new FM spacing requirements.[6] This application, and a companion application for an extension of time to construct facilities, were granted on April 11, 1990, over an informal objection filed by Bel Air. Bel Air did not seek reconsideration of that action.

4. In its Comments opposing the proposed upgrade, Bel Air contends that the "efficacy" of the Adelman proposal depends on the continuing validity of the underlying Class A construction permit and Adelman's stated intention to build the proposed station. In this regard, Bel Air contends that the Class A construction permit is no longer valid, and in view of the previously stated intentions by Adelman to construct facilities at different sites, the current representation by Adelman to construct a Class B1 facility is not "credible."

5. These arguments are not well taken. First of all, there is no Commission proscription barring a permittee from filing an application to modify a construction permit to specify a new transmitter site. As stated earlier, the Adelman application (File No. BMPH-890802IE) to relocate the Station KRAJ transmitter site was granted on April 11, 1990. This is a final action no longer subject to appeal. As such, there is no longer any outstanding issue concerning the validity of the underlying Station KRAJ construction permit. Furthermore, with respect to the Bel Air argument concerning the intention of Adelman to construct facilities, we note that Station KRAJ is now in operation and is awaiting action on its pending license application (File No. BLH-900103KA) to cover its authorized Class A facility. This is at the same site at which the proposed Class B1 facility would be constructed. In view of the representations by Adelman in his petition for rule making and Comments that he will construct these facilities, there is nothing in the record in this proceeding to suggest that Adelman will not go forward with the upgrading of his station. Furthermore, we believe that the public interest would be served by upgrading Station KRAJ in order to provide Johannesburg with a wide area FM service. Therefore, pursuant to Section 1.420(g) of the Rules, we are substituting Channel 280B1 for Channel 280A at Johannesburg, California, and are modifying the construction permit of Station KRAJ to specify operation on Channel 280B1.[7]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 9, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below to read as follows:

Community	Channel No.
Johannesburg, California	280B1

7. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the construction permit

for Station KRAJ, Johannesburg, California, IS MODIFIED to specify operation on Channel 280B1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

8. IT IS FURTHER ORDERED, That the aforementioned Motion for Leave filed by Bel Air Broadcasting Corporation IS GRANTED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] On June 21, 1989, Inland Empire Broadcasting Corporation withdrew its comments. Accordingly, these comments, and Adelman's reply thereto, will not be considered.

[2] In this proceeding, comments were required to be filed by March 20, 1989. Bel Air Broadcasting Corporation did not file its Motion for Leave and Comments until September 29, 1989. Inasmuch as the late-filed Comments pertain, in part, to an application filed by Adelman on August 2, 1989, we will grant the Motion for Leave and consider the late-filed Comments. This will enable us to resolve this proceeding on the basis of a complete record.

[3] This application proposed a transmitter site at 35-21-27 and 117-38-23.

[4] The *Notice of Proposed Rule Making* proposed a site at 35-27-4 and 117-42-41.

[5] In the Supplement to his rule making comments in this proceeding dated November 1, 1989, Adelman proposed coordinates for the proposed Channel 280B1 upgrade at 35-28-39 and 117-41-58.

[6] *See Second Report and Order* in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989).

[7] The reference coordinates for the Channel 280B1 allotment at Johannesburg, California, are 35-28-39 and 117-41-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 87-389

In the Matter of

Revision of Part 15 of the Rules regarding the operation of radio frequency devices without an individual license - CBEMA, NCR, STB and TI petitions.

MEMORANDUM, OPINION AND ORDER

Adopted: March 11, 1991; Released: March 26, 1991

By the Commission:

INTRODUCTION

1. By this action, the Commission addresses the petitions filed by the Computer and Business Equipment Manufacturers Association (CBEMA), NCR Corporation (NCR), STB Systems, Inc. (STB), and Texas Instruments, Inc. (TI) requesting reconsideration of the *First Report and Order* in this proceeding.[1] These petitions request changes to the technical standards, measurement procedures, marketing rules, and equipment authorization procedures applicable to digital devices.[2]

BACKGROUND

2. Part 15 of the Commission's rules governs the operation of radio frequency (RF) devices without an individual license. Digital devices, including computers and peripheral devices, generate and use RF energy. [3] These devices are subject to the standards and other provisions in Part 15 limiting radio noise emitted by unintentional radiators and the provisions in Part 2 relating to the marketing, authorization, and importation of RF equipment.[4]

3. Under Parts 2 and 15 of the Commission's rules, all Class B personal computers and their associated peripheral devices are required to be certified, and other digital devices, such as Class A business computers, are to be verified prior to the initiation of marketing.[5] These requirements are intended to ensure that such devices comply with the applicable FCC technical standards before they are purchased and used by consumers.

4. In the *First Report and Order* in this proceeding, the Commission adopted a comprehensive revision of the Part 15 rules. The objective of this action was to encourage more effective use of the radio frequency spectrum while providing additional technical and operational flexibility in the design, manufacture and use of non-licensed devices. The *First Report and Order* made several changes to the former regulations for digital devices and codified several former rule interpretations.[6] Changes to the technical standards for digital devices included: a new labelling format, a requirement to measure emissions above 1000 MHz if the device generates or uses signals at or above 108 MHz, a new limit on radio frequency emissions conducted onto the AC power lines within the band 1.6-1.705 MHz for Class A devices, and a respecification of the radiated emission limits for Class A devices at a distance of 10 meters instead of 30 meters.[7] The exemption to the marketing rules for certain digital devices in Section 2.806 was clarified as were the general exemptions to the rules for digital devices in Section 15.103.[8] In addition, a number of changes were made in Parts 2 and 15 of the regulations that have general applicability to broad categories of equipment, including digital devices. These changes involved areas, such as the party responsible for imported equipment, and reauthorization and reporting requirements for equipment modifications.

5. In revising Part 15, the Commission incorporated in the rules general requirements concerning measurement procedures. Further, the revised rules reference the specific measurement procedures the Commission will use for determining compliance of certain types of equipment, including digital devices.[9] The Commission stated in the *First Report and Order* that it intended to initiate rule making on each of the measurement procedures in the near future. Subsequently, the Commission initiated a proceeding in General Docket No. 89-44, proposing to replace the current test procedure used by the Commission to determine compliance of digital devices with the rules, with a new procedure.[10] This proceeding remains pending.

DISCUSSION

6. The petitions raise a broad variety of issues. Specifically, the petitions request changes to the rules applicable to digital devices, including the technical standards, measurement procedures, marketing rules, designation of the party responsible for imported equipment, and reauthorization and reporting requirements for equipment modifications. The issues, along with our findings and conclusions, are discussed below.

7. *Technical Standards*. CBEMA and NCR both recommend that the Commission harmonize its technical standards for digital devices with the international standards developed by the International Special Committee on Radio Interference (CISPR).[11] CBEMA indicates that many members of the computer industry have developed multinational markets. It submits that these companies will need to comply with the CISPR standards for equipment marketed in European and Far East countries. These same companies must also demonstrate compliance with the Commission's standards for equipment marketed within the U. S. To reduce design and testing burdens and costs, CBEMA and NCR urge the Commission to conform its standards to the CISPR standards. If different standards must be maintained, CBEMA requests that the Commission accept a demonstration of compliance with the international standards as a *de facto* demonstration of compliance with the Commission's limits.

8. CBEMA and NCR raise certain specific issues related to harmonization with the CISPR standards. They request that the Commission respecify the radiated emission limits for Class B digital devices at a distance of 10 meters from the device rather than the 3 meters specified in the rules in order to be consistent with CISPR standards. AT&T opposes this change on the grounds that it would

obsolete the many existing industry measurement sites that can only accommodate measurements at a 3 meter distance.[12] CBEMA also requests that the Commission revise the rules to provide separate limits for RF energy conducted onto the AC power lines when the emissions from the digital device are broadband. The current FCC measurement procedure requires quasi-peak readings and permits a reduction of the measured levels if the emission is broadband.[13] However, this reduction for broadband emissions is not specified in the rules.

9. We recognize that harmonization of the U.S. standards for digital devices with the international standards may provide certain advantages for equipment manufacturers. However, a general harmonization of the U.S. standards with the international standards for digital devices was not contemplated in this proceeding. We believe that it would be more appropriate to address such a conformance matter in a comprehensive action rather than make piece meal changes to portions of our rules. Accordingly, we are not acting on the petitioners' request for a general harmonization of the U.S. standards with the corresponding international standards. Similarly, we are not ruling herein on whether to accept a demonstration of compliance with the CISPR international RF emissions standards as a demonstration of compliance with the U.S. RF emissions standards. We plan a comprehensive examination of harmonization with international standards issues in a future proceeding.

10. With regard to the petitioners' specific request that we harmonize the measurement distance with the CISPR standard, we continue to believe that RF emissions from personal computers can be measured more easily and accurately at 3 meters than 10 meters. The level of RF emissions from this equipment will be lower at 10 meters and therefore more likely to be masked by ambient signals and noise. Therefore, we continue to believe that the 3 meter measurement distance specified in the rules is appropriate and should not be changed. At the same time, we concur with the petitions that being able to use the same measurements to show compliance with both U.S. and international standards would be useful in many circumstances. Accordingly, we are modifying the rules to permit measurements at greater distances at the discretion of the testing party.[14] We believe that the benefits of this change outweigh the relatively small increase in undetected emissions that may result. Parties are advised, however, that the FCC Laboratory will continue to perform compliance verifications for personal computers at the specified 3 meter distance.

11. With regard to CBEMA's request to include in the rules separate limits for RF energy conducted onto the AC power lines when the emissions from the digital device are broadband, the Commission stated in the *First Report and Order* that this matter it would be considered in another proceeding.[15] CBEMA has not convinced us that it would be appropriate to act on the broadband conducted RF emissions limit issue herein. Because the CISPR international standard has separate broadband and narrowband limits for conducted RF energy, this matter will be addressed in the forthcoming proceeding examining harmonization with the international standards.

12. *Measurement Procedures.* CBEMA raises several issues pertaining to the general measurement procedures contained in Section 15.31. CBEMA requests that paragraphs (b) through (o) of this section be deleted from the rules and placed in the measurement procedures for each specific device. Its concern is that there is potential for conflict between these general provisions and those in the specific, individual measurement procedures. We observe that paragraphs (b) through (o) of Section 15.31 set forth general measurement criteria for all Part 15 devices. The Commission also has measurement procedures for specific devices, such as computers. As new measurement procedures are developed, such as in GEN Docket No. 89-44, those procedures shall be used to measure devices and shall take precedence over the general criteria in Section 15.31. We are amending the rules to clarify this point. However, because measurement procedures have not been developed for all types of Part 15 devices, and because existing measurement procedures may not address all of the general requirements of Section 15.31, we are maintaining paragraphs (b) through (o) of Section 15.31.

13. CBEMA also requests that paragraph (d) of Section 15.31, which permits the use of test sites other than open field test sites, be amended to remove the requirement that the measurement results correspond to those that would be obtained from a properly calibrated open field site.[16] The ability to use a test site, other than an open field site, was codified in the rules to provide the responsible party with an alternative test location.[17] If an applicant wishes to use an alternative site, it is its responsibility to ensure that the measurements obtained are comparable to what would be obtained if testing were performed on an open field site. Absent such a requirement, we would be unable to correlate test results between different test sites. Without such correlation, the Commission could not determine adequately the interference potential of a device or if the device complies with the applicable standards. Thus, this portion of CBEMA's petition is denied.

14. CBEMA requests that the plot of site attenuation data, required by Section 2.948(b)(8) in the description of the measurement facility, not be based on the use of a tuned dipole antenna.[18] CBEMA states that this measurement method is likely to be changed by the Commission when it modifies Bulletin OET 55. However, changes to this provision were not addressed in the *First Report and Order* in this proceeding. Thus, the change requested by CBEMA is beyond the scope of this proceeding and is denied.[19]

15. CBEMA further requests that Section 15.15(b) be amended to state that equipment need only comply with the emission limits when the user accessible controls are set to predefined settings specified in the individual measurement procedures.[20] We do not agree that this change should be implemented. Equipment must comply with our emission standards regardless of the settings of the user accessible controls.[21] To require otherwise could permit equipment to be marketed that does not comply with our standards for specific control settings chosen by the user. Accordingly, this portion of CBEMA's request is denied.

16. Section 15.35 of the rules addresses the detector functions employed by instrumentation used to measure emission levels from Part 15 devices.[22] CBEMA requests that, for clarity, the title of this section be changed to read "Measurement Detector Functions and Bandwidths." CBEMA also requests that, for emissions above 1000 MHz where peak and average limits must both be met, this section be amended to allow compliance to be demon-

strated through only peak measurements, provided the peak measurements show compliance with the average limits.

17. We agree with CBEMA that additional clarity would be provided by revising the title, and we are implementing this change. We do not believe that a change to Section 15.35 is needed to indicate that if a product meets the lower level average emission limits when measured in the peak mode that there is no additional need to perform an average measurement. This is obvious, and we will accept such compliance demonstrations.

18. *Marketing Rules*. The marketing rules generally prohibit the sale, or offer for sale, of RF devices prior to a demonstration that the devices comply with our standards and any applicable type acceptance, certification, notification or verification requirements have been met.[23] In the *First Report and Order*, we revised the exemption to the marketing rules for digital devices provided under Section 2.806(a) to make it clear that the exemption applies only to digital devices subject to verification of compliance.[24] Section 2.806(a) permits the announcement and offer for sale of a digital device subject to the verification procedure that is in the conceptual, developmental, design or preproduction stage, prior to verification of compliance. The prospective buyer must be advised in writing that the equipment is subject to the Commission's rules and will comply before delivery to the buyer or to centers of distribution. TI requests reconsideration of the decision in the *First Report and Order* rejecting an extension of this exemption to Class B personal computers and peripherals subject to certification. TI contends that the former rules permitted the application of the exemption in Section 2.806(a) to digital devices subject to certification.

19. TI provides no new information or arguments to support its position. It offers no plausible explanation for how the former regulations could have reasonably been interpreted to permit the exemption of Section 2.806(a) to apply to equipment subject to certification, i.e., Class B personal computers and peripherals.[25] The ultimate consumer of Class A devices is a business or institutional user. Section 2.806(a) recognizes that, in many instances, digital devices used in businesses, hospitals, factories and educational institutions, must be designed to certain specifications, or must be purchased in such significant numbers as to warrant pre-production (and pre-authorization) sales. But the ultimate users of personal computing devices are the members of the general public. It would simply not be realistic to permit the marketing of computing devices to millions of people and expect delivery of the devices to await a Commission authorization. Enforcement of such a program would be unmanagable. We continue to recognize a distinction between digital devices used for business and those intended for personal use. In the adoption of the marketing rules in 1970, the Commission emphasized that its actions were designed to stop mass marketed devices from reaching the *public* before a grant of equipment authorization.[26] We rejected a request to permit RF devices to be sold, but not delivered, to the general public before authorization. However, we did not forbid conditional sales contracts between manufacturers and wholesalers or retailers, where delivery of devices would be contingent upon a grant of equipment authorization, and we specifically permitted agreements to produce new products, manufactured in accordance with designated specifications. Such normal business activities do not involve the general public. We continue to believe that permitting sale of large numbers of potentially noncomplying devices to consumers poses an unnecessary risk of interference to radio communications. Accordingly, this aspect of TI's petition is denied.

20. TI also requests that the Commission clarify the provision in paragraph (c)(2) of Section 2.806 that permits digital devices to be activated and operated at trade shows prior to certification. TI states that the last sentence in this paragraph, taken in combination with the language in the last sentence in Section 2.803, makes it unclear that such operation of Class B personal computers and peripheral devices, which require certification, is permitted.[27] We observe that the last two sentences of Section 2.806(c)(2) only reiterate the requirements of other applicable rule sections. As these sentences appear to cause the confusion TI mentions and are redundant, we are deleting them. We believe this rule change will address TI's concerns and make it clear that digital devices may be activated and operated at trade shows.

21. *Transition Provisions*. Section 15.37 establishes transition provisions under which Part 15 devices can continue to be authorized, manufactured and imported in accordance with the former rules.[28] CBEMA is concerned that certain rule changes made in the *First Report and Order* may apply immediately to existing equipment. Specifically, CBEMA is concerned about such changes as the extension of the definition of digital devices to include devices operating between 9 kHz and 10 kHz, and the limitation on exempted equipment listed in Section 15.103.[29] Under the transition provisions in Section 15.37, Part 15 devices must comply with either the new rules or the former rules. Thus, existing equipment may continue to be manufactured and imported under the rules in effect prior to the *First Report and Order* until the dates shown in Section 15.37. We believe that Section 15.37 is sufficiently clear on this point and no further action is required.

22. *Party Responsible for Imported Equipment*. Section 2.909 designates the importer as the party responsible for ensuring that imported devices, subject to verification, comply with the appropriate regulations.[30] CBEMA objects to this provision, arguing that the manufacturer should retain responsibility for the product. CBEMA also objects to the statement in the *First Report and Order* and any implication in the rules that the importer must retain copies of the measurement data for verified devices.[31] CBEMA indicates that these are new requirements, not a clarification of the former rules, and that they pose a substantial record keeping burden on both the manufacturer and the importer that is unwarranted and unnecessary for enforcement of the regulations.

23. We believe that the delineation of importer and manufacturer responsibilities for verified equipment, as contained in the revised Section 2.909, is a logical extension of the policies in effect under the former regulations. Importers were and continue to be required to make a formal declaration of compliance at the time of importation.[32] Thus, importers have been responsible for ensuring that the equipment they import meets FCC requirements. Verified equipment poses a unique situation from equipment subject to other forms of equipment authorization because an application for equipment authorization is not filed with the Commission declaring the party responsible for compliance. Therefore, our regulations for verified equipment must clearly state the party responsible for ensuring complaince. We believe that for imported equip-

ment it is inappropriate to hold the foreign manufacturer responsible for compliance because the manufacturer may have little or no control over which of its products may be shipped by another party to the United States.

24. We reject CBEMA's assertion that we have increased the record keeping burden. Importers must routinely retain records on the compliance of the products they import, as noted above. Moreover, the rules the Commission adopted state that the importer is not required to retain the verification data. Instead, it may rely on a written statement from the manufacturer that the equipment complies with the appropriate standards.[33]

25. *Equipment Modifications*. In the *First Report and Order*, Section 2.1043 of the rules, which specifies the requirements governing permissive changes in certificated equipment, was expanded for clarification.[34] This rule section provides that Class I changes, which are changes that do not degrade the performance of the equipment with regard to the performance characteristics regulated by the FCC standards, may be made without submitting information to the Commission. Class II changes, which are changes that degrade performance, require submittal of information and test data to the Commission. Approval is required before the equipment may be marketed. More extensive changes may require the filing of a complete new application for equipment authorization under a different FCC Identifier number. The revision to Section 2.1043 made in the *First Report and Order* provided detailed guidance and examples of how the rules apply to specific types of changes. CBEMA, in its petition, states that the Commission should further amend these regulations to eliminate the filing and Commission approval requirements for Class II permissive changes. CBEMA believes these requirements are unnecessarily burdensome.

26. Equipment subject to certification is placed in that equipment authorization category because there is sufficient risk of interference if noncompliance occurs that scrutiny of measurement results by the Commission is warranted. We believe that Class II permissive changes, which degrade the performance of certified equipment, similarly warrant review and approval prior to marketing to ensure continued compliance. If we were to allow such changes to be made without Commission review and approval, the fundamental purpose of our certification program would be undermined. In addition, our records on certificated products would be meaningless because they would no longer reflect the characteristics of the equipment being marketed. For these reasons, we reject CBEMA's petition with regard to this issue.

27. In the *First Report and Order*, Section 2.1043(a) was revised to state that changes to the basic frequency determining and stabilizing circuitry (including clock or data rates) necessitates the obtaining of a new grant of certification. STB requests that Section 2.1043 be revised to state that a new grant of certification is not required when a crystal oscillator operating below 108 MHz is varied by not more than 5 percent of its fundamental frequency, provided the functionality and features of the device, as originally certified, are unchanged. STB requests that this variation in oscillator frequency be governed under the permissive change provisions. As justification, STB indicates that sometimes an oscillator that is in short supply must be replaced with another operating at a different frequency. STB adds that certain video monitors are more sensitive to the crystal frequency used in the controller board. Thus, STB customizes certain video controller boards for different monitors by making slight changes, usually less than 5 percent, in the crystal frequency.

28. We note that substituting a different oscillator circuit, even with one operating at the same frequency, can cause significant changes in the RF emissions from the device. Significant changes in the RF emissions can also be caused by slight changes in the operating frequency of the oscillator, depending on the resonant frequency of the radiating elements. Consequently, we consider modifications to the basic frequency determining circuits, including clock rate, to be major changes and require application for a new grant of authorization.[35] This requirement for reauthorization applies to all RF devices regulated by the Commission, not just devices operated under Part 15. Using the example provided by STB, if the frequency employed on a video controller board must be changed to customize it for use with a certain video monitor, the emission spectrum produced by that combination is likely to be significantly different from that of the original video controller board/monitor combination. While these two controller boards may perform the same function, they are different products with different RF emission characteristics and interference potential. Thus, separate identification and authorization is required for each product. Accordingly, we are denying STB's request.

29. *Other Issues*. CBEMA also requests that the Commission republish the former rules side-by-side with the new rules due to the relevance of the former rules during the transition periods. While we realize that this would be helpful, the length of the former rules and the expense associated with printing this material make such action impractical. The former rules are published in the October 1, 1988, edition of the Code of Federal Regulations, with modifications as provided in the *Memorandum Opinion and Order* in General Docket No. 85-301.[36] We also observe that the former rules will be published by private parties if there is sufficient demand for them. Thus, CBEMA's request is denied.

30. CBEMA also requests that the Commission direct the Chief Engineer to be liberal in granting waivers of the 5 year limitation on the manufacture of digital devices under the former rules, particularly where it can be shown that such devices have a reasonably long and successful market history without significant design modifications, and where introducing design changes would substantially increase production costs or impact customer functionality.[37] The Chief Engineer has been delegated authority to issue waivers in this regard.[38] The Chief Engineer will, of course, review the merits of requests for such waivers on a case-by-case basis.

ORDERING CLAUSES

31. In accordance with the above discussion and pursuant to the authority contained in Sections 4(i), 301, 302 and 303 of the Communications Act of 1934, as amended, IT IS ORDERED that the Petitions for Reconsideration filed by the Computer and Business Equipment Manufacturers Association, NCR Corporation, STB Systems, Inc., and Texas Instruments, Inc. ARE GRANTED to the extent indicated herein and in all other respects ARE DENIED. In addition, IT IS ORDERED that Parts 2 and 15 of the Commission's Rules and Regulations ARE AMENDED as set forth below, effective upon publication in the Federal Register.

CHANGES TO THE REGULATIONS

32. Title 47 of the Code of Federal Regulations, Part 2, is amended as follows:

1. The authority citation for Part 2 continues to read as follows:

Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U. S. C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.806 is amended by revising paragraph (c)(2) to read as follows:

Section 2.806 *Exemption for a digital device.*

* * * * *

(c) * * *

(2) Any digital device may be operated for the purpose of demonstration at a trade show provided there is displayed a conspicuous notice that the device has not been tested for compliance.

* * * * *

33. Title 47 of the Code of Federal Regulations, Part 15, is amended as follows:

1. The authority citation for Part 15 continues to read as follows:

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. Section 15.31 is amended by revising paragraphs (f)(1) and (f)(3) and adding a new paragraph (p) to read as follows:

Section 15.31 *Measurement standards.*

* * * * *

(f) * * *

(1) At frequencies equal to or above 30 MHz, measurements may be performed at a distance other than what is specified provided: measurements are not made in the near field; and, it can be demonstrated that the signal levels needed to be measured at the distance employed can be detected by the measuring equipment. Measurements shall not be performed at a distance greater than 30 meters unless it can be further demonstrated that measurements at a distance of 30 meters or less are impracticable. When performing measurements at a distance other than what is specified, the results shall be extrapolated to the specified distance using an inverse linear distance extrapolation factor (20 dB/decade).

* * * * *

(3) The applicant for a grant of certification shall specify the extrapolation method used in the application filed with the Commission. For equipment subject to notification or verification, this information shall be retained with the measurement data.

* * * * *

(p) In those cases where the provisions in this section conflict with the measurement procedures in paragraph (a) of this section and the procedures were implemented after June 23, 1989, the provisions contained in the measurement procedures shall take precedence.

3. Section 15.35 is amended by revising the section heading to read as follows:

Section 15.35 *Measurement detector functions and bandwidths.*

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See First Report and Order*, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989). Unless otherwise stated, all references to the Part 15 regulations are to the rules adopted therein.

[2] CBEMA also requested changes to the rules applicable to peripheral devices used with digital equipment. These issues are being addressed in a separate proceeding. *See Notice of Proposed Rule Making* in GEN Docket No. 90-413, adopted September 4, 1990, FCC 90-307.

[3] Radio frequency (RF) energy is defined as electromagnetic energy at any frequency in the radio spectrum between 9 kHz and 3,000,000 MHz. *See* 47 CFR Section 15.3(u). Digital devices are unintentional radiators that generate and use timing signals or pulses at a rate in excess of 9,000 pulses (cycles) per second and use digital techniques. *See* 47 CFR Section 15.3(k). Peripheral devices are input/output devices that feed data into and/or receive data from the central processing unit of a digital device. *See* 47 CFR Section 15.3(r).

[4] *See* 47 CFR Section 15.3(z), 47 CFR Sections 2.801, *et seq.*, 47 CFR Sections 2.901, *et seq.*, and 47 CFR Sections 2.1201, *et seq.*

[5] *See* 47 CFR Section 15.101(a). Class B personal computers are computers marketed for use in a residential environment. *See* 47 CFR Section 15.3(i) and (s). Computers marketed for use in a commercial environment are designated Class A. *See* 47

CFR Section 15.3(h). The rules requiring certification and verification are contained in 47 CFR Sections 2.803, 2.805 and 2.806 and 47 USC Section 302(b).

[6] The reference to the "former regulations" is to the Part 15 rules that were in effect prior to June 23, 1989, i.e., prior to implementation of the *First Report and Order*.

[7] *See* 47 CFR Sections 15.19, 15.21, 15.33, 15.107, and 15.109.

[8] *See* 47 CFR Sections 2.806 and 15.103.

[9] *See* 47 CFR Section 15.31.

[10] *See Further Notice of Proposed Rule Making*, GEN Docket No. 89-44, 6 FCC Rcd 600 (1991).

[11] *See* Pub. 22 of the International Special Committee on Radio Interference.

[12] AT&T was the only party that filed comments in response to the petitions addressed in this order.

[13] *See* 47 CFR Section 15.35. If the difference between the emissions measured with a quasi-peak detector and with an average detector are 6 dB or greater, the measurement procedure permits the signal levels measured with the quasi-peak detector to be reduced by 13 dB. *See* "FCC Procedure for Measuring RF Emissions from Computing Devices," FCC/OET MP-4, July 1987, Section 4.2.2, Note 2.

[14] The existing provisions regarding measurements at distances greater than the specified distance are set forth in Section 15.31(f). *See* 47 CFR Section 15.31(f).

[15] *See First Report and Order, supra*, at para. 104.

[16] *See* FCC Bulletin OET 55, "Characteristics of Open Field Test Sites," June 1985. No changes to this bulletin have been proposed by the Commission.

[17] The existing measurement procedures permit the use of test sites, other than open field sites, provided the measurement results are equivalent to what would be obtained on an open field site. *See*, for example, FCC/OET MP-4, July 1987, *supra.*, at Section 4.0.

[18] *See* 47 CFR Section 2.948(b)(8).

[19] We are addressing the method used to calibrate a test site used with digital devices in the *Further Notice of Proposed Rule Making*in GEN Docket No. 89-44. CBEMA should direct its comments to that proceeding.

[20] *See* 47 CFR Section 15.15(b).

[21] We note, however, that we would not require the device to be compliant if the controls on the device were adjusted in such a manner that the device was also rendered non-functional.

[22] *See* 47 CFR Section 15.35.

[23] *See* generally, 47 CFR Part 2, Subpart I.

[24] *See* 47 CFR Section 2.806(a).

[25] The exemption to the marketing rules contained in Section 2.806(a) was provided in recognition that the development time for complex systems, such as large computers, can be reduced if the manufacturer and potential customers give and take suggestions about the product as it is developed. It is plain from the text of the decision adopting the rule that is now Section 2.806(a) that the Commission did not intend for this exemption to encompass personal computers or peripheral devices. *See First Report and Order*, Docket No. 20780, 79 FCC 2d 28 (1979), at para. 32-33.

[26] *See Report and Order*, Docket No. 18426, 35 FR 7898, May 22, 1970, at para. 12. Since the implementation of these rules, some limited provisions permitting the advertising of non-authorized devices have been added. *See* 47 CFR Section 2.803.

[27] *See* 47 CFR Sections 2.803 and 2.806(c)(2).

[28] *See* 47 CFR Section 15.37.

[29] *See* 47 CFR Sections 15.3(k) and 15.103. CBEMA, in its comments in this proceeding, objected to the requirement in Section 15.103 that only those devices used *exclusively* in a specified application qualify for an exemption. CBEMA indicates that devices *principally* used in a specified application qualified for the exemption under the former rules. This is not, however, the case. *See*, for example, *Report and Order*, GEN Docket No. 84-801, 60 RR 2d 1479 (1976), at para. 8.

[30] *See* 47 CFR Section 2.909.

[31] *See First Report and Order, supra*, at para. 119. *See* , also, 47 CFR Sections 2.953(a) and 2.955(a).

[32] This declaration of compliance is made on FCC Form 740, which must be filed at the time of importation. *See* 47 CFR Subpart K.

[33] *See* 47 CFR Section 2.953(b). Should the Commission need a copy of the verification report, it will request it through the importer. The importer must be able to supply a copy of this report, in English, within 60 days of such a request. *See* 47 CFR Sections 2.946, 2.953(b) and 2.956.

[34] *See* 47 CFR Section 2.1043.

[35] The substitution of a crystal that is designed to operate at the same frequency but differs slightly due to manufacturing tolerance is not considered to constitute a change in operating frequency.

[36] *See* Title 47 of the Code of Federal Regulations, Parts 0-19, October 1, 1988, and *Memorandum, Opinion and Order*, GEN Docket No. 85-301, 3 FCC Rcd 6491 (1988).

[37] RF devices, other than certain receivers, can continue to be produced under the former Part 15 standards, provided the manufacture and importation of these devices ceases prior to June 23, 1994. *See* 47 CFR Section 15.37.

[38] *See First Report and Order, supra*, at para. 149.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-64

In the Matter of

American Telephone and Telegraph Company — RM 7245

Petition for Rule Making

NOTICE OF PROPOSED RULE MAKING

Adopted: March 14, 1991; Released: March 25, 1991

By the Commission:

I. INTRODUCTION

1. Pursuant to the Modification of Final Judgment (MFJ),[1] the Bell Operating Companies (BOCs) were ordered to provide equal access[2] to their customers. Under the MFJ, the BOCs were permitted to route to American Telephone and Telegraph Company (AT&T) the calls of any customer who, by the time equal access was available, failed to select an interexchange carrier (IXC). In 1985, the Commission concluded that routing such default traffic[3] to AT&T was an unreasonable practice that violated the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* We prescribed a uniform Allocation Plan in order to remedy that violation. The Allocation Plan established a comprehensive set of procedures, designed to ensure that customers were fully informed of the choices available to them, and that the customer's choice of a primary interexchange carrier (PIC) was implemented by the local exchange carrier (LEC).

2. Equal access, now virtually complete, encouraged the growth of vigorous competition in the interexchange market. Millions of customers selected their long distance carrier. Over time, many have decided to change carriers, often to take advantage of discounts and other plans being offered by all of the carriers. At the same time, however, some customers have found they were switched to carriers they did not select. AT&T, upon discovery that some of its customers had been switched to another carrier without the customers' permission, filed the above-captioned petition for Rule Making, asking that the Commission reinstate a written letter of agency (LOA) requirement,[4] a requirement which AT&T had earlier opposed. Simultaneously, AT&T filed a civil suit in Federal District Court against MCI Telecommunications Corporation (MCI), charging MCI with unfair telemarketing practices. Previously, in October 1989, AT&T and MCI had filed legal claims against each other alleging false and deceptive advertising.

3. Forty parties filed comments, letters, and reply comments in response to AT&T's request that this Commission impose an LOA requirement. Many of these parties have suggested alternative approaches to resolving the problem of unauthorized switches in customers' long distance service.[5] In addition, during the months following the AT&T filing, Congress, state Public Utility Commissions (PUCs), and the news media focused their attention upon customers' complaints that their long distance carrier had been changed without the customers' authorization.

4. On December 11, 1990, AT&T and MCI informed this Commission that they had reached an out-of-court settlement of their suits, agreeing, as part of the settlement, to propose to the Commission safeguards designed to protect consumers against being switched without their permission.[6] AT&T has not withdrawn its petition and it remains pending before us.

5. Equal access procedures designed to increase consumer choice in telecommunications service should not be used to subvert those choices. We tentatively conclude that a modification of carrier selection procedures is necessary to protect the interests of consumers. We also conclude that the safeguards now proposed by AT&T and MCI in their settlement agreement will be more effective and less burdensome than the amendment to the carrier selection rules originally requested by AT&T in its petition for Rule Making. We seek comment on our tentative conclusion that these revised procedures will serve to diminish substantially the problem of unauthorized switching while continuing to encourage carriers to compete for consumers' business. We also invite comment regarding alternative procedures to discourage unauthorized switching, particularly alternatives suggested in comments filed in response to AT&T's petition.

II. BACKGROUND

6. The Commission, in its *Allocation Order* and its subsequent *Waiver Order* and *Reconsideration Order*,[7] set forth rules and procedures for implementing equal access and presubscription to an IXC. These Orders established, *inter alia*, the use of a LOA, to be filled out by the customer and kept on file by the IXC as evidence that the customer had selected that IXC as its carrier. *Allocation Order*, Appendix B, 101 FCC 2d at 929.

7. The original allocation plan adopted by the Commission required IXCs to have an LOA on file before submitting a PIC change order to the LEC on behalf of the customer.[8] In the face of vigorous objections from various IXCs, including AT&T, that this requirement would hamper competitive efforts by IXCs to market their services to consumers, particularly through telemarketing efforts, the Commission modified the LOA requirement to allow IXCs to place PIC change orders if they had "instituted steps designed to obtain signed" LOAs. *Waiver Order*, 101 FCC 2d at 942. The Commission next considered the issue in 1987, in the the context of a petition filed by the Illinois Citizens Utility Board, requesting revision of the Commission's carrier selection rules. The Commission denied the petition, finding in part that the rules were intended to "facilitate the IXCs' marketing efforts while maintaining the protection embodied in the letter of agency requirement." Illinois CUB Order at 1729.

8. On January 10, 1990, AT&T filed a petition requesting revision of the Commission's carrier selection rules. AT&T proposed returning to the Commission's original rules, allowing an IXC to submit PIC change orders to a LEC on behalf of a customer only when the IXC has an LOA for that customer on file. AT&T alleged that there

has been an increase in the unauthorized switching of customers during the past year, causing inconvenience for customers and creating expense for LECs who must resolve the resultant disputes. AT&T Petition at 7. Comments on AT&T's petition were filed on March 2, 1990; replies were filed March 19, 1990.

A. AT&T Petition for Rule Making

9. The AT&T petition contends that the Commission's existing carrier selection rules were designed to facilitate the equal access process during a period in which millions of customers made IXC selections within a relatively short time. It speculates that the LECs' involvement in distributing customer information and soliciting ballots at that time helped keep the initial rate of errors in processing customer selections reasonably low. AT&T Petition at 5. AT&T claims that recently, however, there has been a sharp increase in unauthorized switching. It reports that it conducted a survey of customers whose service was changed from AT&T to other IXCs, which showed that between 10 and 15 percent[9] of the residential customers switched away from AT&T between February and November, 1989, had not authorized the change. *Id.* at 6. These erroneous switches, AT&T charges, have resulted in inconvenience to customers and increased expense to ICs and LECs. *Id.* at 7. The remedy, it contends, is to change the Commission's rule to require that IXCs obtain written customer authorization prior to submitting customer information to the LEC for processing. AT&T emphasizes that the LOA would not be sent to the LEC, but would remain in possession of the IXC. *Id.* at 8.

10. Parties opposing AT&T's petition[10] assert that a change in the existing rules is not warranted by current market conditions, would be anticompetitive in its effect, and would be harmful to consumers. They argue that the current rules represent a reasonable balance between the IXCs' need for marketing flexibility and the need to protect the public against possible abuses. Opponents deny that the rules were appropriate only during the period of equal access conversions and contend that AT&T has failed to show why a more restrictive rule is necessary at this time. *See, e.g.*, Sprint Comments at 2, 5; MCI Comments at 10-14.

11. According to parties opposing AT&T's petition, AT&T would be the primary beneficiary of any rule change that would make it more difficult for consumers to switch carriers. Sprint Comments at 8; Comptel Comments at 5-7; MCI Comments at 15-16. MCI argues that requiring a signed LOA prior to submission of the customer's order would have little effect on AT&T, but would create a major burden for the rest of the interexchange industry, making it more difficult and costly for its competitors to penetrate the 80 percent of the market AT&T now serves. MCI Comments at 16-17.

12. Several commenters remark that the Commission previously considered and rejected AT&T's proposed rule in the *Waiver Order* and the *Illinois CUB Order*. They note that both MCI and AT&T, in their comments on the Illinois Cub petition, supported continuation of the existing LOA rules, and opposed adoption of the signed LOA requirement. *Id.* at 6-7; CompTel Comments at 2-4; Sprint Comments at 4-6. MCI observes that AT&T also argued at that time that the inability of a carrier to provide a signed document did not prove that the conversion was unauthorized. AT&T explained that "customers frequently ignore requests for return of letters of agency, delay their signatures, or simply fail to comprehend the significance of confirmation forms." MCI Comments at 7, quoting AT&T Comments on Petition for Rule Making, filed July 15, 1986, at 4. Sprint observes that AT&T previously argued that if a signed customer statement were required prior to the submission of a PIC change to the LEC, "telemarketing will be virtually foreclosed . . . ; customer convenience will be hindered; and customer selections can be expected to decline." Sprint Comments at 4, quoting AT&T Petition for Clarification at 6.

B. Alternative Proposals

13. The National Association of Regulatory Utility Commissioners (NARUC) agrees that a change is needed in the Commission's current equal access conversion procedure, but cautions that any rule change should be sensitive to the needs of consumers and competing toll carriers. In lieu of the prior authorization requested by AT&T, NARUC recommends an alternative rule which would require the IC to supply to a customer requesting a change written verification within three business days of the request. NARUC believes that this system would protect against unauthorized changes while keeping the changeover process simple for consumers. NARUC Reply Comments at 1-3. Under the NARUC proposal, the IXC would be required to send the customer a form which would contain at least the following information concerning the changes requested:

a. The current primary interexchange carrier's name;

b. The name of the requested PIC of choice;

c. A complete listing of any terms, conditions, or charges that will be incurred;

d. The name of the person ordering the change;

e. The name, address, and telephone number of the customer and the requested carrier of choice.

Id. at 4. NARUC asserts that its proposal would modify the Commission's current rules only slightly, and that by standardizing what is required of an IC before it initiates a changeover, the Commission would make it more difficult for an IXC to switch a customer without authorization.[11]

14. On December 11, 1990, AT&T and MCI jointly advised this Commission that they had settled their civil suits alleging false and deceptive advertising and telemarketing practices.[12] They further informed the Commission that, as part of the settlement agreement, each had agreed to support adoption by the Commission of certain confirmation procedures designed to guard against unauthorized switching.[13]

III. DISCUSSION

15. We have reviewed AT&T's petition, the comments and letters filed in response to that petition, and the Settlement Proposal submitted by AT&T and MCI. In considering the advisability of imposing a signed LOA requirement, we cannot ignore the earlier arguments made by AT&T, and echoed by other IXCs, against the very rule AT&T, in its petition, seeks to reintroduce.

> The telephone is a convenient and efficient way for customers to make an affirmative choice of a [PIC]. Customers can make a decision and have that decision implemented immediately, as they are accustomed to doing, without the inconvenience of signing and returning any documents and without the delay inherent in that process.

AT&T Petition for Clarification of *Waiver Order* at 4.

> However, if the language of paragraph 10 of Appendix B [of the *Allocation Order*] . . . is construed to require a physical handwriting, customers will no longer be able to place orders over the telephone. Telemarketing will be virtually foreclosed under such a restrictive reading of the Order; customer convenience will be hindered; and customer selections can be expected to decline.

Id. at 6.

16. The Commission, in originally imposing the LOA requirement, anticipated that the signed LOA would be filed and retrieved by the IXC to resolve disputes. In the contemporary telecommunications marketplace, this seldom happens. Both MCI and AT&T offer similar descriptions of their ordering processes: the change order for the customer is entered onto a computer tape by the telemarketer, and the LOAs, if and when they are received, are shipped to a warehouse. If the customer challenges the change, the IXC frequently finds it more cost effective to pay the applicable change charges to the LEC rather than attempt to retrieve the LOA. It is unclear, therefore, that the mandatory LOA requirement would do anything other than slow down the telemarketing process.

17. We are concerned, however, that a large number of customers appear to have been switched to long distance carriers they did not select.[14] Although, as Sprint suggests, it may be impossible in a competitive market to totally eliminate errors in the ordering process, some revision in the procedures IXCs must follow in submitting change orders for long distance service appears to be necessary. In deciding what action to take, we have weighed the need to prevent fraudulent or abusive sales practices against the possibility that some remedies that have been suggested would unnecessarily impede the competitive process and thereby deny consumers the benefits of this process. We have tentatively concluded that the AT&T and MCI Settlement Proposal represents a reasonable method for resolving the problem of unauthorized switching.

18. The safeguards proposed under the Settlement Agreement would require that at least one of the following actions take place before a consumer's long distance service is switched:

> 1. The long distance carrier has on hand an authorization card signed by the customer and sent to the long distance carrier;
>
> 2. The consumer initiates a call from home to an automated 800 number, and through a sequence of prompts, confirms the choice of long distance carrier; or
>
> 3. The consumer's choice of a long distance carrier is verified by an independent firm unaffiliated with any long distance carrier.[15]

The Settlement Proposal acknowledges that customers have the right, of course, to initiate changes in their long distance service by calling their local exchange carrier or long distance carrier directly.[16]

19. The Settlement Proposal also contains a sample script for third party confirmation and describes a "Quality Assurance Program" (QAP). This program would be managed under the direction and authority of an independent auditor selected by each IXC obligated to maintain a QAP, subject to review by this Commission. The full text of the Settlement Proposal, including the confirmation procedures, sample script, and Quality Assurance Program, is provided at Appendix A.

20. Under this proposal, a customer's order for service would be verified in any one of three ways. (Customer-initiated calls would not require verification). This proposal offers greater flexibility to the ICs than would a mandatory LOA requirement and allows competitors to select a verification procedure which best meets their needs and those of their customers.

21. Therefore, we have tentatively concluded that the letter of agency procedures set forth in Appendix B of the Commission's *Allocation Order*, as modified by the *Waiver Order*, should be revised to require IXCs which seek to submit orders to LECs on behalf of customers to certify to the LEC that they have instituted the procedures set forth at Appendix A. Unlike our current procedures, these proposals specify three specific methods to be used in verifying non customer-initiated orders for changed service. We seek comment on our tentative conclusion that these procedures will serve to reduce to a minimal level the number of unauthorized switches in customers' long distance service.

22. We seek comment regarding whether these procedures will be adequate to protect consumers from unauthorized switches in their long distance service. We invite comment regarding whether this Commission should adopt all of the procedures described in the AT&T and MCI proposal, or whether we should adopt only certain portions of the proposal. We also request comment regarding the effect of revised verification procedures on our current requirement that the IXC pay all change charges associated with changes which the customer disputes if the IXC cannot produce a letter of agency. Further, we seek comment on whether the procedures set forth in Appexdix A, or alternative procedures, should apply to customer-owned payphones.

23. We also invite comment regarding whether the various alternatives proposed by NARUC and other parties who have presented their comments in this Rule Making, or any other alternatives, would be preferable to the Settlement Proposal. In particular, we seek comment on the following alternative:

> 1) Within three business days of the customer's request for a change, the IXC sends each new customer an information package containing at least the following information concerning the requested change: a) the name of the customer's current primary long distance carrier; b) the name of the newly requested long distance carrier; c) a description of any terms, conditions, or charges that will be incurred; d) the name of the person ordering the change; e) the name, address, and telephone number of both the customer and the newly requested

long distance carrier; f) a postpaid postcard which the customer can use to deny, cancel, or confirm a service order.

2) The IXC should not submit an order to the LEC for that customer until 14 days after the form is mailed to the customer.

24. Finally, we invite comment on the cost of implementation of the Settlement Proposal procedures and whether these procedures would impose undue burdens on interexchange carriers. In evaluating alternative approaches, we must weigh the need to prevent abusive sales practices against the possibility that some remedies suggested by the parties would unnecessarily impede the competitive process and thereby deny consumers its benefits. We are particularly concerned lest smaller carriers find the proposed procedures burdensome. We therefore ask for comment on whether the procedures we adopt should apply only to carriers of a particular size. We also request comment regarding whether any of the alternative approaches noted above would be more appropriate for small carriers.

IV. PAPERWORK REDUCTION ACT

25. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found not to impose new or modified information collection requirements on the public.

V. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

26. *Reason for action.* The Commission is issuing this Notice of Proposed Rule Making to protect consumers from unauthorized switching of their long distance carriers and to ensure that consumers are fully informed of the costs associated with changes in long distance service.

27. *Objectives.* The objective of this Notice of Proposed Rule Making is to initiate a proceeding to revise the procedures interexchange carriers must follow prior to entering a change order on behalf of a consumer.

28. *Legal basis.* Sections 1, 4(i), 4(j), 201-205, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 303(r).

29. *Description, potential impact and number of small entitites affected.* The proposed rules will require that interexchange carriers adopt one of three methods for verifying customer orders to change long distance carriers. The rules will also require that customers be provided information about charges and services to allow them to make informed choices. Small entitites may feel some economic impact due to the proposed verification requirements.

30. *Reporting, recordkeeping, and other compliance requirements.* The proposed rules impose no reporting requirements and no new recordkeeping requirements. Carriers currently are required to obtain and retain records of customer orders.

31. *Federal rules which overlap, duplicate, or conflict with the Commission's proposal.* None.

32. *Any significant alternatives minimizing impact on small entitities and consistent with stated objectives.* The Notice of Proposed Rule Making solicits comments on whether the verification requirements should be adapted to the size of the carrier.

33. *Comments are solicited.* We request written comments on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. § 601, *et seq.*

VI. EX PARTE REQUIREMENTS

34. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of the public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f) of the Commission's Rules, 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203.

35. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.202(b) of the Commission's Rules, 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

36. Any person who is making an oral *ex parte* presentation presents data or arguments no already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face

the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206.

37. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

VII. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

39. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 U.S.C. §§ 1.415, 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before **May 1, 1991.** Reply comments should be filed no later than **May 31, 1991.** To file formally in this proceeding, participants must file and original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, Downtown Copy Center, room 246, 1919 M Street, N.W., Washington, D.C. 20554.

40. IT IS FURTHER ORDERED that the Secretary shall mail a copy of this Notice of Proposed Rule Making to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

AT&T AND MCI SETTLEMENT AGREEMENT PROPOSAL

CONFIRMATION PROCEDURES

PIC Changes. No interexchange carrier may submit orders to change a customer's primary interexchange carrier (PIC) except in accordance with the provisions of this section.

A. *Definitions*

-- "customer means a person with two or fewer residential telephone lines;

-- "customer-initiated PIC change" means an order to change a customer's PIC that is generated as a result of a communication to an IC or LEC originated by a customer;

-- "independent third party" means an appropriately qualified (*i.e.*, capable of performing large scale verification processes as specified herein) person retained by an IXC to perform verification or auditing functions described in this section and in which the IXC has no ownership interest and which performs no telemarketing, direct mail, or other sales solicitation functions for the IXC;

-- "IXC" means an interexchange carrier or a person (other than an independent third party) acting on behalf of an interexchange carrier;

B. *Mandatory Disclosures.* Any IXC telemarketing solicitations seeking to change a customer's PIC must include the following disclosures:

1) identification of the IXC placing the call;

2) the purpose of the call is to solicit a change of the customer's PIC;

3) the customer's PIC may not be changed unless and until the sale is confirmed, together with a description of the confirmation process to be used;

4) a description of any charge for processing the PIC change that may be imposed by the customer's LEC; and

5) the IXC will send the customer a form that meets the requirements of subsection (c)(1) that authorizes the carrier to submit the PIC change, with a request that the customer sign and return the form to the IXC.

C. *Confirmation.* No IXC shall submit a PIC change order (other than a customer-initiated PIC change) to a LEC unless and until the order has first been confirmed in accordance with the following procedures:

1) the IXC has obtained the customer's written authorization to submit the order that explains what occurs when a PIC is changed and confirms:

a) the customer's billing name and address and each telephone number to be covered by the PIC change order,

b) the decision to change the PIC to the IXC, and

c) the customer's understanding of the existence of the PIC change fee; or

2) the IXC has obtained the customer's electronic authorization, placed from the telephone number(s) on which the PIC is to be changed, to submit the order that confirms the information described in subsection (1) above to confirm the authorization.

IXCs electing to confirm sales electronically shall establish one or more toll-free telephone numbers exclusively for that purpose. Calls to the number(s) will connect a customer to a voice response unit, or similar mechanism, that records the required information regarding the PIC change, including automatically recording the originating ANI; or

3) an appropriately qualified and independent third party operating in a location physically separate from the telemarketing representative has obtained the customer's oral authorization to submit the PIC change order that confirms and includes appropriate verification data (*e.g.*, the customer's date of birth or social security number). The independent third party will use a script substantially similar to the form attached. The IXC must retain the independent third party's services pursuant to a written contract that will be available for inspection by the FCC and that does not provide compensation based upon the percentage of sales confirmed.

4) Regardless of which of the above confirmation procedures is used, the IXC must retain all records and data pertaining to the customer's authorization for a period of 12 months after submission of the PIC change order.

D. *Auditing Requirements*. IXCs shall implement auditing procedures to ensure that the disclosure and confirmation provisions of this section are followed. Such audits will include an analysis to confirm that the IXC is submitting only PICs (other than customer-initiated PIC changes) that have been confirmed in one of the ways specified above. Audits must be performed by a qualified third party at least once every month. If any such audit reveals (1) non-compliance in any material respect with the confirmation requirements of Section C, or (2) a rate of non-compliance in excess of two percent (at a 98 percent level of confidence plus or minus 1 percent) plus the upper bound of the confidence interval, the IXC shall immediately implement corrective measures specified by the auditor, and submit the auditor's report to the FCC.

QUALITY ASSURANCE PRINCIPLES

A. *Quality Assurance Program*. The Quality Assurance Program ("QAP") to be adopted by the FCC is intended to ensure that interexchange carriers ("IXCs") which make more than outbound telemarketing calls per year are not making blatantly false and misleading claims (as defined in Section D below) in their telemarketing sales practices. The QAP is to be managed under the direction and authority of an independent auditor ("QAP Director") selected by each IXC obligated to maintain a QAP, subject to review by the FCC. The QAP Director shall have full and complete access to all items subject to review.

B. *QAP Director's Responsibilities*. The QAP Director shall conduct a quality assurance audit quarterly (1) to determine whether an IXC is making blatantly false and misleading claims ("blatant falsehoods") in its telemarketing practices, and (2) where such blatant falsehoods have been found to occur, to certify when the problem that caused the blatant falsehoods has been corrected. The QAP Director is only to evaluate and report on cases of blatant falsehoods and is expressly prohibited from disclosing to any IXC the marketing claims being made by any other IXC.

C. *Items Subject To Review*. Any IXC subject to the QAP shall provide the QAP Director with any and all information, reports, methods and practices, guidelines, training materials and cooperative assistance requested by the QAP Director for the purpose of making an independent evaluation of (1) scripts and (2) the conduct of telemarketing by the IC. The QAP Director may examine all management controls, including, but not limited to the following:

1. remote monitoring with random selection of monitored representatives;
2. on-site monitoring; and
3. recordkeeping and retention.

D. *Blatant Falsehoods*. Blatant falsehoods are representations that seriously and substantially misstate the nature, characteristics, qualities and geographic boundaries of a competing IXC. Examples include:

1. "[IXC] is going out of business."
2. "[IXC #1] is, by its own choice, no longer providing your services and [IXC #2] has instead been designated as your new long distance carrier."
3. "[IXC #1] and [IXC #2] are part of the same company and/or [IXC #1] has merged with [IXC #2] (or any other similar misrepresentation of a corporate relationship)."
4. "You have no choice about your long distance service" and must change to [IXC]."
5. "Your long distance company or your LEC have authorized the switch to [IXC]."
6. "[IXC] and your local phone company are one and the same."

E. *Corrective Measures*. On a quarterly basis, the QAP Director will monitor a sufficient number of telephone calls in progress to achieve a 98 percent (plus or minus 1 percent) level of confidence that the percentage of calls in which blatant falsehoods are occurring does not exceed 2 percent. If that level is exceeded, the IXC must implement corrective measures immediately. The QAP Director shall then commence monitoring of the IXC on a monthly basis until the IXC reduces the percentage of blatant falsehoods below 2 percent. A report on the non-compliance shall be submitted to the FCC until the corrective measures are effective.

F. *Costs*. Costs of each IXC's QAP will be borne by the IXC subject to the QAP.

SAMPLE SCRIPT FOR THIRD PARTY CONFIRMATION

Hello, my name is _____ from _____, an independent verification company. I'm calling to confirm your order for [IXC] long distance service.

Q1. I'd like to confirm your name, address and telephone number(s). IF AVAILABLE ON SCREEN, READ BACK. Is that correct? TAKE ANY CORRECTIONS. IF NOT ON SCREEN, ASK FOR EACH ITEM AND RECORD.

Q1A. Did you or another person in your household recently receive a call asking you to select [IXC] as your long distance company?

Q2. I'd like to confirm that you have decided to select [IXC] to carry long distance calls from this (these) telephone(s). Is that correct?

Q3. I'd like to confirm that you are an adult resident of this household. Is that correct? IF QUESTIONED BY CUSTOMER, MAY STATE THAT PURPOSE IS TO DETERMINE IF YOU ARE A DECISION MAKER FOR LONG DISTANCE SERVICE FOR THE HOUSEHOLD.

Q4. I'd like to confirm that you were advised that the local telephone company may charge a fee for switching to [IC]. Is that correct? IF CUSTOMER ASKS HOW MUCH, VERIFIER MAY STATE AMOUNT FROM LEC TARIFFS.

Q5. Finally, to show that I've spoken to you, please give me the last four digits of your Social Security Number. RECORD INFORMATION; IF CUSTOMER REFUSES, TRY DATE OF BIRTH OR MOTHER'S MAIDEN NAME.

I will now process the order. Thank you and goodbye.

IF RESPONSE IS NEGATIVE ON ANY ITEM, INFORM CUSTOMER THAT YOU CANNOT PROCESS THE ORDER AND THAT THE CUSTOMER MAY SPEAK DIRECTLY WITH IXC OR MAY CALL THE LOCAL PHONE COMPANY TO ORDER THE SWITCH IN SERVICE TO THE IXC. ANY QUESTIONS (EXCEPT THOSE IN THE Q AND A) ABOUT THE LONG DISTANCE SERVICES OR RATES ARE TO BE REFERRED BACK TO THE IXC.

Would you like me to return you to an IXC representative? IF YES, THE CALL CAN GO BACK TO THE IXC REPRESENTATIVE.

APPENDIX B

Pleadings Filed in Rule Making No. 7245

Petition for Rule Making, filed January 10, 1990 by American Telephone and Telegraph Company

Comments, filed March 2, 1990

Ameritech Operating Companies (Ameritech)

Competitive Telecommunications Association (CompTel)

General Communications, Inc. (GCI)

MCI Telecommunications Corporation (MCI)

Pennsylvania Office of Consumer Advocacy and the National Association of State Utility Consumer Advocates (PAOCA/NASUCA)

Southwestern Bell Telephone Company (Southwestern Bell)

US Sprint Communications Company Limited Partnership (Sprint)

Replies, filed March 19, 1990

AT&T

America's Carriers Telecommunications Association (ACTA)

MCI

National Association of Regulatory Utility Commissioners (NARUC)

Nebraska Public Service Commission (Nebraska PSC)

Operator Service Providers of America (OSPA)

Southwestern Bell

Sprint

United States Telephone Association (USTA)

Letters

California Public Utilities Commission
CFW Telephone Company
Citizens Telephone Cooperative
City of Charleston, West Virginia
Consumer Action
State of Colorado
Conference of Consumer Organizations
Dubois Telephone Exchange, Inc.
Illinois Commerce Commission
Iowa Network Services, Inc.
Iowa State Utilities Board
Lincoln Telephone Co.
Louisiana Consumers League
Maryland Public Service Commission
Minnesota Department of Public Service
Minnesota Public Utilities Commission
Office of Minnesota Attorney General
Montana Public Service Commission
Nebraska Public Service Commission
Ohio Public Service Commission
Oklahoma Corporation Commission
Roosevelt County Rural Telephone Cooperative, Inc.
South Carolina Public Service Commission
United Refining Co. of Pennsylvania

Virginia State Corporation Commission

West Virginia Public Service Commission

Western New Mexico Telephone Co., Inc.

Wisconsin Public Service Commission (Wisconsin PSC)

FOOTNOTES

[1] *See* United States v. American Tel. & Tel., 552 F. Supp. 131 (D.D.C. 1982) *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[2] Equal access is that which is equal in type, quality, and price to access to local exchange facilities provided to AT&T and its affiliates. *Id.* at 227.

[3] Default traffic refers to the interexchange telephone calls of any customer who failed to make a selection of an interexchange carrier.

[4] A letter of agency is a document, signed by the customer, which states that a particular carrier has been selected as that customer's long distance carrier. In its petition, AT&T seeks a requirement that an IXC have a customer's LOA on file before submitting an order to the local exchange carrier to switch that customer to the IXC's service.

[5] AT&T describes the unauthorized switching of customers as "slamming." MCI describes such switches as SWOPs (switched without permission).

[6] *See* Letter from James L. Lewis, MCI Telecommunications Corporation, to Secretary, Federal Communications Commission, Dec. 12, 1990 (MCI Letter).

[7] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 FCC 2d 911 (1985)(*Allocation Order*), *recon. denied*, 102 FCC 2d 503 (*Reconsideration Order*); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 FCC 2d 935 (1985)(*Waiver Order*). *See also Illinois Citizens Utility Board Petition for Rule Making*, 2 FCC Rcd 1726 (1987)(*Illinois CUB Order*).

[8] Customers may also order service directly from the LEC.

[9] AT&T later refined this figure, alleging that 13.9 percent of the end users switched away from AT&T are unauthorized PIC changes. AT&T Reply at App. I.

[10] A list of parties filing pleadings in this matter appears at Appendix B.

[11] Alternative approaches to the problem of unauthorized switching were also suggested by MCI, Sprint, Ameritech, Bell Atlantic, and Comptel.

[12] *See* MCI Letter, n.4, *supra*.

[13] On February 12, 1991, MCI and AT&T formally filed a joint request that the Commission adopt the proposal contained in Attachment A of this NPRM.

[14] In recognition of the problems consumers have encountered, the Commission issued a Public Notice on November 2, 1990, informing consumers of their rights and describing steps they might take to protect themselves against unauthorized switches.

[15] At the present time, AT&T's own supervisors verify telemarketing orders for long distance service; MCI reports that it has initiated a system of third party verification, which is not yet complete.

[16] *See* Settlement Proposal, Confirmation Procedures, at Section C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-558

In re Applications of

VICTORSON GROUP, INC.	File No. BPH-870918MF
EISON AND ASSOCIATES, LIMITED	File No. BPH-870918MJ
R.B. LEE RUST	File No. BPH-870918MQ
TAYLOR COMMUNICATIONS OF ROCHESTER	File No. BPH-870918NE
CHRISTIAN DISCERNER, INC.	File No. BPH-870918NB
BEST BROADCASTING COMPANY, L.P.	File No. BPH-870918NN

For a Construction Permit for
New FM Station, Channel 290A,
Rochester, New York

Appearances

Howard J. Braun, *Shelley Sadowsky*, and *Heidi P. Sanchez*, on behalf of Victorson Group, Inc.; *Barry A. Friedman* and *Staci Rhodes*, on behalf of Eison and Associates, Limited; *Richard A. Helmick* and *Stanley S. Neustadt*, on behalf of R. B. Lee Rust; *John J. Duffy* and *Nora E. Garrote*, on behalf of Taylor Communications of Rochester; *James L. Oyster*, on behalf of Christian Discerner, Inc.; and *William E. Kennard*, *Michael E. Beller*, and *William F. Vincent*, on behalf of Best Broadcasting Company, L.P.

DECISION

Adopted: March 15, 1991; Released: March 28, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.
Board Member BLUMENTHAL:

1. The Review Board has before it the *Initial Decision*, 5 FCC Rcd 4506 (1990) (*I. D.*), of Administrative Law Judge John M. Frysiak (ALJ), granting the Construction Permit application of Eison and Associates, Limited (Eison) for a new commercial FM station on Channel 290A, at Rochester, New York, and the exceptions and replies thereto filed by all of the above-captioned parties. Oral Argument was held before the Board on December 14, 1990.

BACKGROUND

2. The *Hearing Designation Order*, 4 FCC Rcd 519 (1989) (*HDO*), in this proceeding designated the six captioned applications (along with eight others now dismissed) for consolidated hearing on various issues, including: (1) a financial qualifications issue against Eison; and (2) our "standard comparative" issue. Eison prevailed below on on its financial issue (*but see infra* note 2). However, the ALJ later added financial qualifications and false financial certification issues against Best Broadcasting Company, L.P. (Best), *Memorandum Opinion and Order*, FCC 89M-1915, released July 20, 1989, and upon the evidence disqualified Best on both issues.

3. Having concluded that all of the other five applicants were basically qualified, the *I. D.* then compared the five under the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*). Finding that the differences between the applicants on the various other criteria set forth in the *Policy Statement* were decisionally insignificant, he ultimately favored Eison on the factor of integration of equity ownership into active station management. Victorson ranked second. Because we must agree with the exceptors that Eison did not meet its burden of proving entitlement to credit for 100% full-time management integration, we review the other exceptions and concur with the *I. D.* that Victorson prevails over the balance of the field. We commence our review with the exceptions directed toward Eison.

EISON AND ASSOCIATES, LIMITED

4. Eison is a limited partnership consisting of one "general" partner, Carvin Eison, and two "limited" partners, Allen Wheeler and David Webb. *I. D.*, para. 43. Eison himself has a 25% equity interest in the applicant and formally proposed to work full-time at the station as its general manager. *Id.*, paras. 43, 61. However, Eison's antagonists challenge the ALJ's award of a (constructive [1]) 100% full-time integration credit to Eison, because circumstantial evidence and Eison's own testimony tended to undercut deeply his written integration pledge to "fully withdraw from his current and any future employment or business pursuits" upon any grant of his instant broadcast application. The exceptors also challenge the "permanence" of Eison's broadcast commitment.

5. The record reveals that, in March 1989 (subsequent to his application filing), Carvin Eison formed a television and motion picture production company called Eison Telepictures, Inc. Eison Exh. 2; Tr. 346. Eison is Telepicture's sole full-time employee, Tr. 346-347; and, as Rust's brief states (at 7), he performs services "uniquely personal in nature, dependent upon his artistic skills and talent and not readily capable of being performed by others." When asked at hearing as to the viability of Telepictures without his presence, Eison replied: "On the basis of today's realities there is a little to no chance that it could go on." Tr. 362.

6. Nonetheless, and despite an acknowledgement of Eision's indispensability to Telepictures, the record shows that Telepictures has several long-term projects, defined by Eison as a "year's commitment" that, if "started tomor-

row, it would be about a year by -- before they're completed." Tr. 358. One project, for the Global Hunger Project, involves recording a series of concerts in Africa and producing a tape for international distribution. The other involves the percussionist Max Roach. Tr. 360. Eison alluded to other potential long-term projects, including one involving the Garth Fagen Bucket Dance group for

> television production that would -- again, it would be another limited type situation where the 20th anniversary of that company is approaching in 1990, and we may be doing a -- a -- rather a feature length program on that -- on those terms for -- on national PBS. There's discussion about that, but it's not -- there" -- there is not a contract just yet.

Tr. 367.

7. When queried about his unconditional FCC pledge to withdraw completely from other business pursuits, Eison commenced to equivocate:

> COUNSEL: Well, do you -- I mean, what is your intention with regard to Eison Telepictures? Are you going to dissolve it, or not, if you win?
>
> EISON: If we win, and -- and it's my -- it's -- it's -- and I have to dissolve it, and I -- it can't no longer exist. I don't know for a fact that I would have to dissolve it. I mean, you know, there's other ways of -- of dealing with that.
>
> * * *
>
> COUNSEL: Where it reads, "Mr. Eison will fully withdraw from his current and any future employment, or business pursuits, in the event your application was granted?"
>
> EISON: Withdrawing and dissolving are not the same thing. I don't have to dis -- dissolve it.
>
> COUNSEL: Oh, I see. You'd -- you'd keep the business?
>
> EISON: No, I -- perhaps, if it was a strong enough entity on its own, which at this point in time it is not. I am essentially the company.
>
> If it was capable of being managed by someone else, if -- if -- if I was that fortunate at that time, then that certainly would be an option.

Tr. 350-352.

8. Further indications of Eison's ambivalence are also reflected in the transcript:

> COUNSEL: Well, let's look at some of your statements at deposition. Do you remember making the statement, "*I will, you know, never be completely divorced from television. I' ve been involved in it too long.*" Do you remember that statement?
>
> EISON: Yes, correct.

Tr. 349 (emphasis added).

> EISON: (reading from a newspaper describing his "destiny" to make feature films):
>
> "The Witness, *The radio station, if it's successful, could possibly make it -- could make it possible for me to do more extensive video and film work.* Maybe not."

Tr. 411 (emphasis added). Eison went on:

> . . . it's the work [filmmaking] that I've done. I mean, it would be a logical conclusion for me to do that. It's -- it's what I've been. I went to school to do it. I've worked for the past 12 years in some capacity and I've been doing that, so it makes sense that I would do that.
>
> I would -- I think you should think it was strange if I quit that and became, you know, a gas station attendant or, you know, a plumber or something, because -- I mean, that's what I -- that's what I wanted to do, so I'm doing that.

Tr. 411-413.

9. Eison's concept of the "permanence" of his integration commitment only heightens the Board's misgivings. As the record reflects, Eison's ambition to "do other things" in addition to managing the broadcast station is candidly disclosed:

> COUNSEL: Well, isn't it -- isn't it your intention to -- to work at the station as the general manager until the station gets successful, then you're going to go on to other things?
>
> EISON: . . . *I think, I mean, I -- I don' t see why if it's successful, that would only bind me to that one obligation.* If it's successful, the outgrowth from that would be -- would be obvious. In the same way that my success as a television producer has allowed me to do other things. It's allowed me the -- for example, the --just the general knowledge to even approach something as complicated as this application here.

Tr. 347-348.

> COUNSEL: I finally found the reference in your deposition I was looking for, beginning at page 156, Your Honor, May 25, 1989, deposition. Beginning at line 16, question, "If the station turns out to be a

financial success, would you consider your commitment to have been fulfilled and would you move on to something else?"

Answer, " *I would really have to speculate a lot in order to answer that question.* If it's successful, I would probably want to keep at it."

Question, "On a full time basis?"

Answer, "*On a full time basis, perhaps, and maybe not. If it's successful, I would probably want to keep it going, but also add other things to it, you know, or do other things.* That is what I really see. I mean, it's not like all of a sudden, this is going to be the one and only thing that there is. I think that it'll be -- I think that it will be the one and only thing that there is in terms of making it work, but once it is working, I think, you know, it is like your children, you know, you work on them and you develop them, but when they get a certain age, they're kind of like they work on their own, based on what you have put into them and how you prepare them. I think this would work in the same way. You don't divorce yourself from it totally. Maybe it won't require as much involvement, maybe it will require more involvement. It's hard to say."

Is that your testimony?

EISON: That's correct.

COUNSEL: And that's accurate. Correct?

EISON: That's correct.

Tr. 353-354 (emphasis added).

10. *Discussion*. Under the Commission's competitive licensing protocols, each applicant has the burden to prove its entitlement to the credit it seeks under the comparative criteria established in the 1965 *Policy Statement*. *Royce International Broadcasting*, 5 FCC 2d 7063 (1990); *Julia S. Zozaya*, 5 FCC Rcd 6607 (1990). And where an applicant has a current business interest which could conflict with a principal's pledge to devote his or her *full - time* to management of the proposed station, the applicant must make a specially convincing showing as to how those interests are to be simultaneously accommodated, or integration credit will be denied. *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969). Those two principles are firm. *See, e. g., Leininger - Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987); *Margaret Garza*, 1 FCC Rcd 1294 (Rev. Bd. 1986); *Ft. Collins Telecasters*, 103 FCC 2d 978 985-86 (Rev. Bd. 1986). Equally firm, and "[a]s with other [comparative] proposals, it is important that integration proposals be adhered to a permanent basis." *Policy Statement*, 1 FCC 2d at 395 n.6 (citing *Tidewater Teleradio, Inc.*, 24 R.R. 653).

11. We agree with the exceptors that Eison's integraton proposal fails on two counts. First, and notwithstanding an unequivocal written proposal to withdraw from his filmmaking activities, Eison's hearing testimony withdrew *instead* the unqualified nature of the pledge itself, and quite plainly conditioned his withdrawal from Telepictures on the relative success of the new radio station. Indeed, the more successful the station, the greater Eison's impetus to return to filmmaking and television video, from which Eison flatly declared he could "never be completely divorced." On the face of this record, we find Eison's commitment to devote full-time to radio station management to be so contingent on externalities, as well as the fickle vicissitudes of business fortune, that Eison has not met its ordinary evidentiary burden. And, second, in view of that same testimony, we cannot conclude that any management integration by Eison would be permanent within the purport of the 1965 *Policy Statement*. *See, e. g., Martin Intermart, Inc.*, 3 FCC Rcd 1650, 1652 (Rev. Bd. 1988) (credit denied where principal committed to work full-time as general manager "for only so long as necessary 'to accomplish a good operating position'"); *cf. Signal Ministries, Inc.*, 104 FCC 2d 1481, 1497-1498 n.16 (Rev. Bd. 1986) (ownership integration cannot be contingent)(subsequent history omitted).

12. Because we grant those exceptions going to Eison's ownership/management integration credit, and find in consequence that other applicants rank much higher under the *Policy Statement's* comparative schema, we need not address dispositively the serious questions concerning Eison's finances, synopsized only briefly in the margin.[2]

VICTORSON GROUP, INC.

13. Victorson, ranked second by the ALJ, is a New York corporation comprised of three voting shareholders, and one non-voting. *I. D.*, para. 28. The voting shareholders, Scott Gudell (57.2% of the corporate equity), Jerdine Johnson (21.4%), and Kathleen McGraw (21.4%) all propose to work full-time at the station. Gudell will serve as general manager, Johnson as news and public affairs director, and McGraw as business manager. *Id.*, paras. 30, 34, 38. The ALJ awarded Victorson a 100% quantitative integration credit; but all of the exceptors (save Best) contest that substantial award.

14. Initially, the exceptors maintain that Victorson is not entitled to credit for McGraw's proposed participation, arguing that her position and proposed duties are non-managerial in nature. We must disagree. The 1965 *Policy Statement* specifically lists the role of business manager as one of the staff positions entitled to integration credit, *see* 1 FCC 2d at 395. Further, since January 1979, McGraw has been employed as the business manager of stations WEZO/WNYR, Rochester. *I. D.*, para. 40. In January 1980, she also became the business manager for station WUHF-TV, the radio stations' sister facility. *Id.* Her proposed duties are similar to those she currently performs at the Rochester stations, *see id.*, and are consistent with those routinely associated with the business manager position. She will terminate her current employment to assume her new duties at the proposed facility. *Id.*, para. 38. [3] The Board, therefore, finds no legal or factual basis upon which to disturb McGraw's personal integration credit.

15. Taylor's exceptions also urge that credit should not be given for Gudell's proposal, since he testified he will occasionally sell air time for the station. Taylor also asks that credit be denied for Johnson's integration, in light of her extensive civic involvement. These exceptions are likewise without merit. Commission precedent is clear that full integration credit will be awarded to principals,

even if time would be devoted to sales. *Debra D. Carrigan*, 100 FCC 2d 721, 738 (Rev. Bd. 1985)(subsequent history omitted); *see also Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3667 (Rev. Bd. 1987). And, as for Johnson's civic activities, Victorson invokes Johnson's undisputed testimony, noting that her current activities entail no more than an average of one or two meetings per week. We find no basis on which to diminish Johnson's integration credit, *compare, e. g., Julia S. Zozaya* (*inter alia*, applicant's unusually extensive civic activities mar full-time integration pledge).

16. Finally, Taylor contends that there are uncertainties regarding the identity of Victorson's future principals. Its claim is based on a vague notation found on a page of a document (Eison Exh. 10) submitted to the bank for Victorson's financing. Gudell explained at hearing, however, that the individuals (only titles, not names) referenced in the document were people consulted "for advice and a sounding board on ideas to formulate a station . . . ." Tr. 86. He averred that those individuals had no ownership interest in the applicant nor was there any understanding as to future interests. Tr. 92-93, 105-106. Moreover, the document reviewed by the bank referred to the present Victorson principals by name, giving a brief description of their backgrounds, and stating their intentions to work at the station. Tr. 83-84. Their financial statements were also the ones, and the *only* ones, submitted to the bank for review. Tr. 103-104. We find altogether no solid basis for speculating that other investors will join Victorson in the future. The 100% quantitative integration credit awarded to Victorson by the ALJ, being afflicted by no apparent decisional error, is affirmed.

BEST BROADCASTING COMPANY, L.P.

17. Best is a New York limited partnership, whose sole "general partner," Wyoma Best, proposed to integrate as the station's general manager. However, the ALJ concluded that there had been a failure of proof on both the false financial certification and financial qualifications issues he had added himself, and he disqualified Best. Best was not considered in the *I. D. 's* comparative analysis, and Best excepts to its disqualification under both issues. Because we are constrained to agree with the ALJ's resolution of the basic financial qualification issue, we do not address the "subjective question of whether there also existed 'a conscious intent to deceive' when the applicant certified it was financially qualified." *Texas Communications Limited Partnership*, 5 FCC Rcd 5876, 5877 (Rev. Bd. 1990), *recon. denied*, FCC 91R-16, released February 27, 1991.

18. Although both the burdens of proof and of going forward on the designated financial issue were placed on Best, *Memorandum Opinion and Order*, FCC 89M-1915, released July 20, 1989, it failed at hearing to demonstrate, first, that prior to certifying its application Best had duly ascertained the actual costs of contructing the station (and operating for the inaugural three months). *See Revision of Form 301*, 50 RR 2d 381, 382 (1981); [4] *see also A. P. Walter, Jr.*, FCC 91R-13, released February 14, 1991, at para. 10. Or, second, that funds were reasonably available to meet both start-up costs. [5]

19. As to the first aspect, estimated costs, the applicant submitted at hearing a letter of September 14, 1987 from Ms. Best to Frederick Blake, a management consultant, engaging Blake to prepare a business plan for her application. Best Exh. 5. She testified, however, that at her request Blake never prepared such a plan, *I. D.*, para. 14, and her prior deposition testimony had alluded only to a "general sense" of construction costs accompanied by some "scribblings." *See* Br. at 5 & n.5. Otherwise, her hearing testimony is nebulous as to the applicant's estimated costs or to concrete steps taken before certifying as to Best's financial qualifications. Best's original limited partner, Vincent Henry, also indicated a "general sense" (from Ms. Best) of the costs for contructing a radio station as being in the hundreds of thousands of dollars (around $300,000 or more), but he had no specific information as to how any of Best's own cost figures were actually derived. Tr. 745-746. This plain failure to prove that Best's projected costs were meaningfully ascertained is, standing alone, grounds for denial of Best's application. *See Susan S. Mulkey*, 4 FCC Rcd 5520, 5523 n.3 (1989); *see also Northampton Media Associates*, *supra* note 5. [6]

20. As to the second aspect, funds availability, Best provided only a letter, dated September 15, 1987 (three days prior to the application filing), from Ragan A. Henry, a prominent miniority broadcaster, which in part stated:

> Please be advised that I am prepared to assist Best Broadcasting Company, L.P. in obtaining financing to construct the station if you are granted a license. In the event that institutional financing cannot be arranged on your behalf, I would be willing to personally lend Best Broadcasting Company, L.P., subject to guarantees by you and Vincent A. Henry, up to $300,000 at 9% per annum interest rate, to build the station. Please be advised that I have available in ready convertible assets more than sufficient monies to pay the cost of constructing such a radio station.

Best Exh. 6. However, and as the Commission stated in *Northampton Media Associates*, 4 FCC Rcd at 5519:

> Where the lender is not a financal institution but a person, as in this case, the applicant must show that the person proposing to lend the funds had the necessary financial resources at that time. In such a case, we believe that a balance sheet of other documentary evidence (such as a financial statement) demonstrating that, at the time of certification, that person had sufficient net liquid assets to meet his financial commitment to the applicant would be clear evidence to support the certification.

Unfortunately, the solitary exhibit Best supplied at hearing to support its claim that (on the date of certification) Ragan Henry had sufficient net liquid assets to meet his financial commitment to the applicant was *redacted* in all critical respects. Best Exh. 8. Moreover, Ms. Best conceded that "she did not review Mr. Henry's financial statement before certifying Best's financial qualifications." Br. at 7. The 1987 Statement itself simply reflects a date, total assets, total liabilities, and an approximate net worth. However, no liquid or readily convertible assets were identified. [7] And Best's brief here acknowledges that Ragan Henry had simultaneously pledged to extend loans for construction and initial operating expenses to three

other FCC broadcast applicants. Br. at 29. In a slightly different context, *see Texas Communications Limited Partnership*, 5 FCC Rcd at 5878 (and cases cited therein), we have held that where multiple broadcast applications are simultaneously on file with the FCC, and a financial issue is added, an applicant must prove the availability of sufficient liquid assets to fund *each* and *all* of the applications concurrently on file. Best never attempted such a showing, nor did it try to prove at hearing its own objective knowledge of Ragan Henry's actual financial status. In fact, Ms. Best conceded that her own information came solely from the hearsay of her (former) counsel.[8]

21. Without directly conceding its rather abject failure of proof at hearing, Best now submits that any such failure should be laid at the feet of (former) counsel and not visited upon itself. *See* Br. at 47. But, in rejecting similar arguments in the past, the Commission has held:

> Counsel is the applicant's agent . . . and the applicant is bound by counsel's actions. Thus, although it is counsel rather than applicants who generally appear before us in these matters, they do so on behalf of their applicants. Were we to excuse all failures of counsel, we would leave our ALJ's with no power to control proceedings. This would severly hinder the efficiency of our proceedings, particularly those involving multiple parties, which in turn would be unfair to other applicants and would delay service to the public. We believe it is appropriate, therefore, to expect that applicants will choose their counsel with care and know that they will suffer the consequencies if they are represented by counsel who do not vigorously prosecute their applications.

Hillebrand Broadcasting, Inc., 1 FCC Rcd 419, 420 n.6. It could very well be that Best's undeniable failure to adequately meet the serious financial issues designated by the ALJ with a preponderance of its own evidence is, in whole or part, attributable to (former) counsel. But the Board's charter is to determine only whether the ALJ has committed substantive or procedural error in conducting the case and applying the law. Based strictly on the record here, we can report no such error, and hold that Best's failure of proof at hearing must be deemed legally fatal to its application.

FINAL COMPARATIVE EVALUATION

22. In the *I. D.*, Victorson, Eison, Rust, and Discerner were awarded 100% quantitative integration credit by the ALJ. But we have declined to affirm Eison's credit, and Best was properly disqualified by the ALJ for a failure of proof on its financial issue(s). Taylor proposed no ownership/management integration, and must also be considered uncompetitive. *See I. D.*, para. 113. Where there is no "clear quantitative percentage" separating the otherwise qualified applicants, *see Miracle Strip Communications*, 4 FCC Rcd 5064, 5066 (1989), the Commission next turns to the qualitative attributes of the integrated principals in selecting a winner. These attributes include local residence, minority ownership, civic participation, female ownership, and past broadcast experience, and these enhancements are proportionate to the quantitative ownership of the integrated principals. *See, e. g., Debra D. Carrigan, supra*, 104 FCC 2d at 833. In comparing applicants, local residence and minority ownership are accorded equal weight. *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985). Minority ownership has more significance than female ownership. *Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751, 5753 n.10 (1990). And female ownership outweighs past broadcast experience. *See Swan Broadcasting Limited, supra*, 6 FCC Rcd at 21.

23. Applying these standards, Victorson is entitled to 100% long-term local residence (augmented by local civic activity), 42.8% female ownership, and 78.6% past broadcast experience. Rust is entitled to only "service area" residence credit, which is not accorded as much weight as Victorson's residence credentials in the very community of license. *See Policy Statement*, 1 FCC 2d at 396. And, Rust's civic involvement in Rochester has been less extensive than the Victorson principals. *See I. D.*, paras. 33, 36, 41, 74. Further, under current FCC standards, Rust's past broadcast experience is insufficient to overcome Victorson. Finally, Discerner, a non-profit organization, is entitled to comparative credit only for the pledge of its sole principal, James Oyster, to manage its station. Oyster has no past local residence or civic activities. Like Rust, Discerner cannot prevail over Victorson on the other important comparative citeria by which we must meaure, and it thus ranks far behind Victorson.

24. ACCORDINGLY, IT IS ORDERED, That the application of Victorson Group, Inc. (File No. BPH-870918MF) for a Construction Permit for a new FM broadcast station on Channel 290A at Rochester, New York IS GRANTED; and that the applications of Eison and Associates, Limited (File No. BPH-870918MJ), R.B. Lee Rust (File No. BPH-870918MQ), Taylor Communications of Rochester (File No. BPH-870918NE), Christian Discerner, Inc. (File No. BPH-870918NB), and Best Broadcasting Company, L.P. (File No. BPH-870918NN) ARE DENIED; and,

25. IT IS FURTHER ORDERED, That the Request for Leave to Supplement to Environmental Impact Showing, filed September 5, 1990 by Best Broadcasting Company, L.P., IS GRANTED; that the Motion for Leave to Accept Pleading, filed September 5, 1990 by Eison and Associates, Limited, IS GRANTED; and that the Petition for Leave to Amend, filed October 1, 1990 by Christian Discerner, Inc., IS GRANTED, and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] In ascertaining the quantitative integration percentage to accord an applicant, the Commission initially looks to the percentage of an applicant's voting control proposed into the day-to-day managerial-level station operations. *See generally V. O. B. Incorp.*, 5 FCC Rcd 5872 (Rev. Bd. 1990).

[2] But for the fact that Eison receives no integration credit and could not prevail comparatively over Victorson, we would follow the tenets of recent cases such as *Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 2843 (1990),

aff'd by Judgement sub nom. Virginia Lefebvrev. FCC, No. 90-1284 (D.C. Cir. March 8, 1991); *Sharron Annette Haley*, FCC 91R-25, adopted March 5, 1991 (Rev. Bd.); *Marc A. Albert*, 6 FCC Rcd 13 (Rev. Bd. 1991); *Carol Sue Bowen*, 6 FCC Rcd 10 (Rev. Bd. 1991), and remand this case to the ALJ to determine: (1) whether Eison had "good cause" to amend its application approximately sixteen months after it acknowledged in its application that it then lacked the financial resources to certify that it was financially qualified; and (2) whether Eison misrepresented or lacked candor when representing in its application that its "financial proposal [was] being formulated *at this time*." *See, e.g., Carol Sue Bowen*, 6 FCC Rcd at 12 n.2; *Bernstein*, 4 FCC at 8422 n.6. For all the current record shows, it was not until after the issuance of the *HDO* that Eison acquired assurances of a loan, and we know not what Eison did in the preceding sixteen months that might qualify as the "due diligence" necessary to amend at the much later date. *Compare Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 30 (Rev. Bd. 1982) (applicant "diligent but the victim of a 'run of bad luck'"). Although we recognize that Eison's February 1989 amendment was unopposed, and might ordinarily therefore reject exceptions as to that amendment, the Board, the Commission (and the courts) have made crystal clear that, even where basic qualifying issues are involved, "good cause" must be shown for a post- designation amendment. *See, e.g., Bernstein; see generally Pepper Schultz*, 4 FCC Rcd 6393, 6400 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 3273 (1990). Here, Eison has provided no explanation of the sixteen month hiatus between its application and its amendment. Knowing full well of its critical deficiency throughout that period, it need not and could not have idly waited the issuance of the *HDO* to have remedied its vital disqualifying defect. *See Sharron Annette Haley*, FCC 91R-25, *supra* at para. 7; *see generally Carol Sue Bowen*, 6 FCC Rcd at 12 n.1 (defects known prior to *HDO* must be promptly corrected).

[3] The exceptions would also deny McGraw credit because of her alleged lack of involvement, relative to Gudell, in the prosecution of the application. The record, however, reveals that she participated in prosecuting the application. Tr. 38, 49, 106, 145-145. In any event, there is no prohibition against the majority principal leading the way in prosecuting the application, providing the other active principals will play true and actual roles in management. *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7272 (Rev. Bd. 1990). There is no evidence that McGraw will not do so here.

[4] In revising the application form, the Commission emphasized that it was not, "in any way, modifying the underlying substantive financial criteria . . . ." 50 RR 2d at 382.

[5] An applicant for a broadcast station must be able to certify that it has "reasonable assurance" of "sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the requested facilities for three months without revenue" before its application may be granted. FCC Form 301, Section III, Items 2(a), *Financial Qualifications Aural Broadcast Applicants*, 69 FCC 2d 407 (1978); *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990); *Jam Communications, Inc.*, 4 FCC Rcd 3754, 3757 (Rev. Bd. 1989). To prove "reasonable assurance" of financial qualifications at the time of certification, the applicant must adduce *probative* evidence that, prior to certification, (1) "it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs"; and (2) "the applicant must provide substantial net liquid assets on hand, or committed sources of funds to construct and operate the three months without revenue . . . ." *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-5519 (1989) (emphasis added). "Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds." *Id.*

[6] We must reject Best's contention that the ALJ was arbitrary and unreasonable in not allowing it to supplement its direct case: he properly ruled that Best's direct case was frozen as of the exchange date. The Commission has repeatedly underscored that its ALJs must be given broad discretion to regulate the course of multiparty comparative hearings. *See Hillebrand Broadcasting, Inc., infra* . The exchange date for direct written cases was set for September 11, 1989, almost two months after specification of the qualifying issues against Best. Like its competitors, Best had ample notice and opportunity to prepare and timely exchange its direct written case on the issues specified against it; absent a very persuasive showing as to why it was unable to do so, the ALJ's refusal to allow Best to materially supplement its direct written case on the eve of the hearing, or at the hearing itself, is not subject to reversal. *See generally Las Americas Communications, Inc.*, 1 FCC Rcd 786, 795 (Rev. Bd. 1986) (upholding ALJ's authority to strike a substantial portion of applicant's direct comparative case where counsel failed to get sponsoring principals/witnesses to hearing by the time cross-examination was ready to begin). The sole reason given by Best for not timely exchanging the information contained in its supplemental exhibits is that it was in the process of retaining additional counsel to assume primary responsibility for the hearing, and co-counsel had not entered his appearance until the date set for the exchange of the direct case exhibits. That reason is insufficient. *Cf. Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) (offers to parry with late evidence rejected). But even assuming that the supplemental exhibits had been allowed into evidence, it is difficult to discern how Best could have satisfied its burden of proof without adducing much more information from Ms. Best, whose critical supplemental testimony on cost ascertainment (if any) was *not* included in the supplement. Thus, additional evidentiary documentation would be required to remedy the deficiencies found in Best's initial and supplemental evidentiary proffers, and we will not remand or delay this case simply to permit Best to try again an issue on which it had more than ample hearing notice. That it squandered its opportunity at hearing is not the fault of the ALJ or the other qualified applicants.

[7] Best proffered a second (unredacted) Statement of Assets and Liabilities of Ragan Henry, but that second Statement is not probative of liquid assets at the time of certification; it merely lists his assets as of July 12, 1989, nearly two years *after* Best's original certification. In the face of the financial issue designated against it, Best was required to show the availability of liquid assets *at the time of certification*. *Northampton Media Associates, supra*, 4 FCC Rcd at 5519.

[8] Because of the complete void in this record on the subject of Ragan Henry's liquid assets as of Best's 1987 financial certification, the Board has no basis for speculating as to the extent of those assets, and does not intend to suggest otherwise. But we may not take these things on faith. *Cf. Northeast Cellular Telephone Co. L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (finances must be proven).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-238

In re Applications of

JO-AL BROADCASTING, INC.	File No. BPH-880616MP
B & H BROADCASTING SYSTEM, INC.	File No. BPH-880616MQ
PATRICIA D. CAMP & ANN E. DUPRE' d/b/a DUPRE' BROADCASTING CO.	File No. BPH-880616MW

For Construction Permit for a
New FM Station on Channel 284A
in Texarkana, Arkansas

Appearances

James L. Winston, Esquire, and *Walter E. Diercks, Esquire*, on behalf of Jo-Al Broadcasting, Inc.; *William E. Kennard, Esquire*, and *Michael E. Bellar, Esquire*, on behalf of B & H Broadcasting System, Inc.; *F. Joseph Brinig, Esquire*, and *Lawrence Bernstein, Esquire*, on behalf of Patricia D. Camp & Ann E. Dupre' d/b/a Dupre' Broadcasting Co.; and *Norman Goldstein, Esquire*, on behalf of the Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: March 19, 1991; Released: March 26, 1991

PRELIMINARY STATEMENT

1. This proceeding was designated for hearing by *Hearing Designation Order*, DA 90-635, released June 4, 1990. Prehearing conferences were held August 20, 1990, and February 1, 1991.[1]

2. Under consideration are a "Motion for Summary Decision"[2] filed by Jo-Al Broadcasting, Inc. (Jo-Al) on February 8, 1991 [3]; "Joint Petition for Approval of Settlement Agreement" filed by Jo-Al, B & H Broadcasting System, Inc. (B&H), and Patricia D. Camp & Ann E. Dupre' d/b/a Dupre' Broadcasting Co. (Dupre') on February 19, 1991[4]; "Mass Media Bureau's Comments in Support of Motion for Summary Decision" filed by the Bureau on February 22, 1991; and "Mass Media Bureau's Comments on Joint Petition for Approval of Settlement Agreement" filed by the Bureau on March 4, 1991.

3. The applicants herein have entered into an agreement to resolve this proceeding and have submitted such agreement for approval. Pursuant thereto, B&H and Dupre' have agreed to dismiss their applications in consideration of the payment by Jo-Al of $25,000 to each of the dismissing applicants. The agreement is contingent on the favorable resolution of a financial issue specified against Jo-Al and the award of the construction permit to Jo-Al.

4. The applicants have complied with the requirements of the applicable statute and Commission rules governing agreements of this nature (Section 311(c)(3) of the Communications Act of 1934, as amended, and Sections 73.3525(a)(1) and (a)(2)). They have demonstrated that approval of the agreement will eliminate the need for a comparative hearing, thereby facilitating the inauguration of a new service at an early date. Also, each applicant has declared that it did not file its application for the purpose of entering into or effectuating a settlement agreement.

FINDINGS OF FACT

5. By *Memorandum Opinion and Order* of the Presiding Judge, released December 13, 1990 (FCC 90M-3932), the following issue was specified against Jo-Al:

> To determine whether Jo-Al Broadcasting, Inc. is financially qualified to be a licensee of the Commission.

In designating the issue, the Presiding Judge observed:

> There is no showing as to estimated cost of construction and initial operation, nor is there a showing of the funds available to build and operate the station and whether these funds are adequate. No specific figures have been presented by Jo-Al to demonstrate that it is financially qualified.

Thus, it appeared that Jo-Al did not adequately or effectively respond to the request for a financial issue.

6. Jo-Al's estimated cost of construction and initial operating expenses, including professional and filing fees, totalled $334,050. This total was broken down as follows:

Equipment	$146,800
Installation and Freight	23,800
Debt Service	9,750
Professional and Filing Fees	61,800

The estimate for three months' operation was $91,900, broken down as follows:

General and Administrative Expenses	$ 19,650
Sales Expenses	13,500
Technical Expenses	23,000
Programming Expenses	35,750

Thus, at the time of certification, Jo-Al estimated that it needed $334,050 to build and operate the station.

7. To meet its estimated costs of $334,050 at the time of certification, Jo-Al relied on its Vice-President, Alcus Davis, as its primary source of funding and upon its President, Emmie J. Gamble, as its secondary source. Mr. Davis has been married to Ms. Gamble's sister, Delphynne J. Davis, for 27 years. This long standing family relationship provided each with a reasonable assurance that the other could meet his or her respective commitment. Ms. Gamble and Mr. Davis have provided net worth statements as of the time Jo-Al filed its application and as of February 5, 1991. At the time of certification, Davis had net liquid assets in excess of $333,000, and Gamble had net liquid assets in excess of $51,000. The current statements indicate that Davis has net liquid assets totalling slightly under $300,000, and Gamble has net liquid assets slightly in excess of $56,000. Both Gamble and Davis are willing to utilize their assets to provide the funds necessary to finance Jo-Al's anticipated costs. In addition, their spouses have authorized the use of their joint funds for the purpose of financing the station. The cash flow of both Davis and Gamble has enabled them to meet all current net liabilities shown on their respective financial statements for the relevant years. The largest single asset upon which Davis relies is the net equity in the Davis residence (*i.e.*, approximately $210,000). An appraisal dated September 29, 1990, estimates the market value of the house at $426,479. Although there is no appraisal as of the 1988 certification, the current appraisal appears to give credence to the $213,000 valuation given the residence as of the time of certification. Moreover, Jo-Al has a current availability of a line of credit in the amount of $210,000, based on a Second Trust Deed on the property.

8. In summary, a review of the net liquid assets demonstrates that both as of June 16, 1988, the date of financial certification, and February 5, 1991, Jo-Al's principals had combined net liquid assets sufficient to meet estimated costs as well as to provide a cushion for unanticipated expenses. Specifically, at the time of certification, Mr. Davis and Ms. Gamble demonstrated the availability of $384,000 to meet estimated costs of $334,050, leaving a cushion of approximately $50,000. Currently, they demonstrate the availability of more than $355,000 to meet the current outstanding estimated costs of $304,490. (The $334,050 original cost estimate is reduced because $29,560 has already been expended on an on-going basis.) Jo-Al's cost estimate, however, includes $50,000 for legal expenses of which, in light of the settlement, only approximately $18,000 will be expended. Thus, Jo-Al is left with a cushion in excess of $82,000. This is more than sufficient to permit Jo-Al to meet its obligation to pay a total of $50,000 for the dismissal of the competing applications.

ULTIMATE FINDINGS AND CONCLUSIONS

9. Jo-Al has shown the availability of $384,000 of net liquid assets at the time of certification to meet estimated costs of construction and operation of $334,050. Presently, Jo-Al remains financially qualified. It has shown the availability of over $355,000 to meet remaining costs of $304,490. Moreover, the cost estimates included a larger sum for legal fees than what is now required because of the settlement. Jo-Al has reasonable assurance of the necessary funds to build and operate the station as well as to meet its obligation under the settlement agreement. It is financially qualified. *Northampton Media Associates*, 4 FCC Rcd 5517 (1989).

10. Summary Decision, pursuant to Section 1.251 of the Commission's rules, should be granted where the truth is clear, the basic facts are not in dispute, and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. *Big Country Radio, Inc.*, 50 FCC 2d 967 (1975). The burden is upon the moving party to demonstrate that there is no genuine issue of material fact. *Telecorpus, Inc.*, 30 RR 2d 1641 (1974). Jo-Al has met its burden here. Jo-Al has provided a comprehensive showing that demonstrates it was financially qualified as of the date of certification and continues to be qualified today. Jo-Al is entitled to Summary Decision on the financial issue.

Accordingly, IT IS ORDERED that the "Joint Petition for Approval of Settlement Agreement" filed by Jo-Al Broadcasting, Inc., B & H Broadcasting System, Inc., and Patricia D. Camp & Ann E. Dupre' d/b/a Dupre' Broadcasting Co. on February 19, 1991, IS GRANTED; the agreement IS APPROVED; the applications of B & H Broadcasting System, Inc. (File No. BPH-880616MQ) and Patricia D. Camp & Ann E. Dupre' d/b/a Dupre' Broadcasting Co. (File No. BPH-880616MW) ARE DISMISSED, with prejudice;

IT IS FURTHER ORDERED that the "Motion for Summary Decision" filed by Jo-Al Broadcasting, Inc. on February 8, 1991, IS GRANTED, and the financial issue specified against Jo-Al Broadcasting, Inc., IS RESOLVED in its favor;

IT IS FURTHER ORDERED that the application of Jo-Al Broadcasting, Inc. (File No. BPH-880616MP) for a construction permit to build a new FM station on Channel 284A in Texarkana, Arkansas, IS GRANTED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Chief Administrative Law Judge

FOOTNOTES

[1] A hearing was convened on January 16, 1991, at which time the applicants stated they had agreed to a universal settlement, pending action on a motion for summary decision.

[2] This motion was not filed within 20 days of the rescheduled hearing date. However, Jo-Al has shown good cause for having its motion accepted and considered on the merits despite being filed two days late. The Presiding Judge has such discretion pursuant to Section 1.251 of the Commission's rules.

[3] On March 14, 1991, Jo-Al filed a letter forwarding Amended Stock Subscription Agreements relating to the stock subscriptions of Ms. Emmie J. Gamble and Mr. Alcus Davis, Jo-Al's only shareholders. The original Stock Subscription Agreements signed by Ms. Gamble and Mr. Davis contained a typographical error indicating that they were for non-voting stock. However, it was the intention, at all times, that both Ms. Gamble and Mr. Davis would subscribe for voting stock. Declarations attesting to the foregoing facts, signed by Ms. Gamble and Mr. Davis, were also filed.

[4] On February 25, 1991, Jo-Al filed original signature pages (signed by the President of B&H) to the Settlement Agreement, Escrow Agreement and Declaration.

[5] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to 48 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-71

In re Applications of

CHEROKEE BROADCASTING CORPORATION	File No. BPH-880204MJ
RADIO CENTRE, INC.	File No. BPH-880209MF
BAKER ENTERPRISES INC.	File No. BPH-880210MO

For Construction Permit for a New FM Station on Channel 290A in Centre, Alabama

Appearances

Gary L. Smithwick on behalf of Cherokee Broadcasting Corporation; *Lawrence J. Bernard, Jr.*[1] and *Robert L. Stone* on behalf of Radio Centre, Inc.; and *Y. Paulette Laden* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: March 18, 1991; Released: March 27, 1991

1. The two applicants in the caption, Cherokee and RCI, and one other applicant Baker, now dismissed were designated for hearing on February 7, 1990. *Cherokee Broadcasting Corporation*, 5 FCC Rcd 1095 (1990). The following issues and all pending motions will be decided in this decision:

> 1. To determine, with respect to RCI, if the applicant is financially qualified.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. A prehearing conference was held on May 7, 1990. Tr. 1-7. A hearing session to cross-examine the written testimony was held on September 5, 1990. Tr. 8-208. The record was closed on September 5, 1990. *Order*, FCC 90M-2813, released September 7, 1990. Proposed findings and conclusions were filed by the applicants and only on the comparative coverage issue by the Mass Media Bureau on October 17, 1990. Replies were filed by the applicants on November 8, 1990.

FINDINGS OF FACT

Issue 1: Whether RCI is financially qualified and whether RCI's efforts to become financially qualified show that RCI would be a reliable and trustworthy licensee.

3. Currently pending is a renewed motion to dismiss RCI's application by Cherokee. The basis of Cherokee's request is that RCI did not make a good faith effort to become financially qualified. RCI represented to the Commission on February 9, 1988, that it was formulating its financing plans and that when they were complete it would file an amendment to its application. Two and a half years have passed and RCI has yet to file the amendment. On May 7, 1990, at the prehearing conference, RCI was directed to file an amendment but it did not do so. On July 27, 1990, Cherokee originally moved to dismiss RCI for failure to amend. That request was denied because it appeared then that RCI had presented a financial plan to Cherokee at a deposition session held on July 13, 1990. The Commission, however, was not notified, by amendment or any other filing, that RCI believed it was qualified. At the time the July 27, 1990 motion to dismiss was considered, it appeared that RCI was deliberately not notifying the Commission because it could not meet the standard good cause test for amending. In the event that that was the case, RCI was notified that the financial issue would be expanded to review the honesty of RCI's actions and strategy on this issue.

4. RCI is an Alabama corporation. RCI Exh. 1. John C. Kelsey owns all the stock and he is president and a director of the corporation. RCI Exh. 1. Freda Kelsey, his spouse, is secretary and a director. *Id.* (In an *ex parte* letter written to the presiding officer after the close of the record, Ms. Kelsey claimed she is a co-owner of RCI.) Mr. Kelsey certified the Form 301 application on February 7, 1988. Cherokee Exh. 6, at 9; Tr. 55. He indicated on Form 301 that RCI was financially qualified by checking the box for yes. He hedged his answer by typing in that "financing plans are being formulated; an amendment will be filed when they are completed." Cherokee Exh. 6, at 7. The Mass Media Bureau, when it designated this case for hearing, noted that the promised amendment had not been filed two years later, on February 7, 1990. *Cherokee Broadcasting Corporation*, *supra*, 5 FCC Rcd 1095. The Bureau characterized RCI's response to the financial question as ambiguous.

5. RCI decided to apply for this channel in 1987. Tr. 54. Mr. Kelsey contacted his counsel in 1987 and retained him in December, 1987. Tr. 57-58. Mr. Kelsey reviewed the application and instructions to the application. Tr. 60. In December 1987 or January 1988 he decided to put the language in the application about being in the process of formulating his financial plans. Tr. 63. He discussed the language with his counsel and counsel typed the application for him. Tr. 60. The box yes was checked and the statement was provided with the intention of indicating a qualified yes, Mr. Kelsey said. Tr. 64. He conceded that RCI was not then financially qualified in the sense that the Commission means. *Id.* RCI could have amended as a matter of right until April 20, 1988 but Mr. Kelsey said the applicant was not qualified then either. Tr. 65, 66, 83.

6. Mr. Kelsey was asked how he went about making a plan to finance his proposal in 1988. He said there was no written budget for construction and he could not remember whether there was a budget for the first three months of operations in 1988. Tr. 66. The first time RCI produced

a written budget of any sort was on the day Mr. Kelsey was deposed, July 13, 1990. Tr. 66; Cherokee Exh. 7. Mr. Kelsey said the budget was written by his counsel on that day. Tr. 66.

7. The time period for discovery was over on August 10, 1990. On August 20, 1990, RCI produced documents, which it had promised to produce at the deposition. Cherokee Exh. 8; Tr. 68. At page 4 of Cherokee Exh. 8 are other estimates of costs which are undated. Mr. Kelsey said that these were "[s]ome of the notes that I gathered over the years." Tr. 69-70. Mr. Kelsey claims the notes were prepared before the deposition in possibly 1988 or 1989. Tr. 70, 71, 72, 75-76. But these notes, which Mr. Kelsey maintained were prepared before he received an equipment estimate from Harris Corporation Broadcast Division on June 19, 1990, bear a striking resemblance to that estimate. Tr. 72; RCI Exh. 2, Attach. A. The antenna, tower and studio estimates in the notes were about the same as those in the June 19, 1990 Harris proposal. Tr. 78, 79, 79-80. At the hearing, Mr. Kelsey represented that he had received other Harris estimates before there was even a channel allocated, which he said were sent to him unsolicited. Tr. 72. This Harris list (or lists) was never produced in discovery. Tr. 72, 75-76.

8. Mr. Kelsey's estimates of what the proposal will cost vary from document to document. For example, in the handwritten sheet prepared by counsel on the day of the deposition (Cherokee Exh. 7), legal fees were estimated at $20,000, in the undated notes produced on August 20, 1990, the estimate is $10,000 (Cherokee Exh. 8, at 4) and in the written exhibits exchanged on August 20, 1990, the estimate is $8,000. RCI Exh. 2, at 2; Tr. 84. When Mr. Kelsey was asked to explain these differences, his response was not understandable. First he said the $20,000 amount given on July 13, 1990 at the deposition was his counsel's estimate. Tr. 84. The $10,000 amount was his estimate. Tr. 84. He has paid counsel $3,000 and has an unpaid bill for $5,000. Tr. 85. The bills will be more than that, however, and apparently he has promised to make a deferred payment of $8,000 at some other time. Tr. 85, 88. Except for a $1,000 retainer fee Mr. Kelsey paid to his counsel at the outset, he has had to borrow money to pay all bills and fees. Two weeks before the hearing, he borrowed $2,000 from a Centre bank to pay his counsel. Tr. 88, 91. He borrowed the money to pay the filing fees from his father. Tr. 88, 91. Mr. Kelsey and his wife had a joint income in 1989 of $30,000.

9. When RCI moved for the admission of its written exhibits, on September 5, 1990, it asked to lower its costs. When RCI Exhibit 2 was exchanged on August 20, 1990, RCI estimated that construction of a transmitter building would be $7,500 but on September 5, 1990, RCI believed it would be $3,500. Tr. 45-46. Installation of equipment was also changed: it would not be $10,500 estimated on August 20, 1990 but $1,000, with a waiver of the installation payments until three months after the station was operating. *Id.*

10. Mr. Kelsey said that he relies on lease financing by Mid-States Financial Corp. of equipment to be supplied by the Harris Corporation and a loan from his father, John T. Kelsey. Tr. 102; RCI Exh. 2, at Attach. B; RCI Exh 3, at 1. The letter from Mid-States, promising to lease RCI the equipment, is dated June 28, 1990 (RCI Exh. 2, at Attach. B) and the letter from his father promising to lend Mr. Kelsey $100,000 is undated. Cherokee Exh. 12. Mr. Kelsey said that his father had agreed to lend him the money recently. Tr. 105.

11. In RCI Exh. 2, RCI stated that its construction costs, with leased equipment, would be $50,275.12 and its operation costs for three months would be $15,853.00. RCI Exh. 2, at 2, 4. RCI would need to have a source for these funds in order to be found qualified. Mid-States will purchase the equipment from Harris and RCI in turn must pay Mid-States. RCI claims its source for the $66,128 is a loan from Mr. Kelsey's father. Other documents in the record show an estimated need of $131,509.67 (Cherokee Exh. 8, at 9), which comes from notes prepared by Mr. Kelsey at some unspecified time and produced on the day he exchanged his written case, and $74,775.12 (Cherokee Exh. 7), which was prepared by counsel on the day of Mr. Kelsey's deposition, July 13, 1990.

12. Mr. Kelsey represented that from the time he filed RCI's application on February 9, 1988 until he could no longer amend as a matter of right, on April 20, 1988, he spoke with his father, John T. Kelsey, F. H. Boney, who holds the mortgage on his current station, and the Farmers and Merchants Bank in Centre, Alabama about lending him money. Tr. 93, 94, 98.

13. The evidence shows that F. H. Boney wrote to Mr. Kelsey on February 18, 1989, not during 1988, and there is no written confirmation that the Farmers and Merchants Bank was interested in lending Mr. Kelsey money as he claimed. Tr. 97, 99. Mr. Kelsey never told his counsel about the bank's interest in lending him money and the 1988 letter from Boney was never produced during discovery. Tr. 99, 98. When it was pointed out to him that he had not produced a 1988 letter from Mr. Boney, he agreed that Mr. Boney had not sent him a letter in 1988 promising a loan. Tr. 96. Mr. Kelsey also represented that he spoke with his father in 1988. Tr. 94. The letter in the record from Mr. Kelsey's father is undated but Mr. Kelsey concedes it was not written in 1988. Mr. Kelsey does not claim that he talked with anyone else about a loan before this hearing was designated. Tr. 100.

14. The loan to RCI or Mr. Kelsey from his father is necessary to meet RCI's financial obligations of somewhere between approximately $66,000 to $131,000, depending on which estimate RCI relies on. Mr. Kelsey said he did not mention specific amounts when he talked with his father in 1988; he just told him about his application. Tr. 106. He claims that in April of 1989 his father promised to lend him either $90,000 or $100,000. Tr. 107. But then again Mr. Kelsey said he did not talk specific amounts because he did not know in April 1989 that he would need $100,000. Tr. 110. In fact, Mr. Kelsey cannot remember when his father sent him the undated letter. Tr. 115. Mr. Kelsey's testimony about his father providing the letter is not responsive. At Tr. 112 and 116, he appeared to just be answering without giving any thought to the questions. At Tr. 112, he said yes in answer to every question, regardless of whether he had just given a contrary answer which made his response inconsistent. He thinks he told his father in April 1989 that he needed a letter. Tr. 115. When Mr. Kelsey was asked whether his father wrote the letter he said yes and then he said no. Tr. 116. Ultimately he explained that his father wrote the letter that is part of the record from one counsel had

provided. Tr. 121. Mr. Kelsey never saw financial information about his father's net worth until a week before the hearing. Tr. 113-14.

15. Mr. Kelsey knew he had to tell the Commission when the facts changed about his finances but he did not do anything until May 1990 because he believed the proceeding was on hold. Tr. 124-25, 129. Consequently, he never talked with his attorney about providing the promised amendment at designation time. *Id.* When Mr. Kelsey was asked why he did not amend in June 1990, when he claims he became financially qualified, he represented that he changed his mind but he did not know why, he just decided not to do so. Tr. 101, 102.

16. Like his son, Mr. Kelsey's father, John T. Kelsey, cannot remember when he signed the letter to his son. John T. Kelsey did assert that he had written the letter himself and then had it typed. Tr. 196. The content of the letter he represented came from conversations he had with his son. Tr. 196. Since Mr. Kelsey claims he drafted the letter he was asked why, in the words of the letter, he made the letter's promise "subject to the filing of a formal application for such a loan and compliance with our requirement for such a loan at the time. " Cherokee Exh. 12. John T. Kelsey said that he did not expect a formal application. Tr. 198. When he was asked about the requirement in the letter that "[a]ll advances would be secured by your personal guarantee" and "a security interest in the assets of the station, both equipment and real property" (Cherokee Exh. 12), he said he did not want a personal guarantee. "I -- it's repugnant -- it's contrary to my character," Mr. Kelsey announced. When counsel for RCI asked him whether he would require collateral as the letter states, Mr. Kelsey said he would not. On the other hand, John C. Kelsey said he thought his father would require a security interest in the station assets. Tr. 122. John T. Kelsey had liquid assets of $62,459 at the time of the hearing. Tr. 103. He had $34,000 in the bank and $28,459 in a Nuveen bond fund. *Id.*; RCI Exh. 3, at 1. The letter from him promises to lend $100,000. Cherokee Exh. 12. The letter is still being counted on by RCI. Tr. 121-22.

Issue 2: Comparison of the applicants

Cherokee

Proposals to work at the station full time

17. Cherokee is an Alabama corporation. Cherokee Exh. 1, at 1. The corporation has two classes of stock. Wynette R. Hayes is president, director and owns 498 voting shares or 99.6% of the voting stock. *Id.* Roy D. Hayes, her spouse, is secretary-treasurer, a director, and owns one voting share or 0.2% of the voting stock. *Id.* John D. Faulk is a director and owns one voting share or 0.2% of the voting stock. *Id.*

18. The nonvoting shareholders are Mary H. Faulk, John Faulk's spouse, who owns 349 nonvoting shares, the estate of Jack D. Boozer, who owns 50 nonvoting shares, and Tracy L. Hall who owns 40 nonvoting shares. *Id.*

19. Initially the Faulks owned approximately equal shares of voting stock. Tr. 35. Mr. Faulk did not know why the change was made to the current ownership plan. Tr. 35-36. He knew it was not related to their contributions of money since all the contributions are made from joint funds. Tr. 35-37. The Hayes also originally owned equal shares of voting stock but all of Mr. Hayes voting stock was given to Ms. Hayes except one share. Tr. 37.

20. Ms. Hayes proposes to work full time, 40 hours per week as the general manager of the station. Cherokee Exh. 2. All department heads will report to her and she will oversee the construction of the station. *Id.* Mr. Faulk proposes to work full time, 40 hours per week, as station/operations manager. *Id.* He will supervise all programming employees and all sales employees. *Id.* Although Ms. Hayes said that all department heads will report to her, she conceded that the station will have only five employees and the programming and sales employees will report to Mr. Faulk. Tr. 31.

The qualities of the persons who will operate the station

21. Ms. Hayes has lived in Centre since 1985 and previously during the periods 1947 to 1963 and 1975 to 1980. Cherokee Exh. 2, at 2; Tr. 17. From March 1976 to 1978, she belonged to the American Business Women's Association and from June 1979 to March 1981 she was a member of a nondenominational worship center. *Id.* She worked as business manager/controller for Palmer Communications, Inc. from June 1984 to December 1985. Palmer is the licensee of WTNT-AM/FM, Tallahassee, Florida. Ms. Hayes seeks a female preference.

22. Mr. Faulk will move to Centre if a grant is received. Cherokee Exh. 2. He will end any other employment before program test authority begins. *Id.* From 1956 to 1989, Mr. Faulk has worked at broadcast stations. *Id.* Since 1967, he has held managerial positions. *Id.*

RCI

The quantity of time proposed by owners

23. RCI is an Alabama corporation. John C. Kelsey owns all the RCI stock and he is president and a director of the corporation. RCI Exh. 1, at 1. His spouse, Freda, is secretary and a director. *Id.* Mr. Kelsey proposes to work full time, 40 hours per week, as the general manager of the station. *Id.* He will plan and implement all financial, programming and sales policies for the station, hire and supervise all station employees. *Id.* Mr. Kelsey plans on performing sales work more than 50% of the time. Tr. 157. He currently works at station WAGC(AM) from 5:30 a.m. to 9:00 p.m. Tr. 155. WAGC is owned by RCI.

Mr. Kelsey's qualitative attributes

24. Mr. Kelsey has lived within the 1 mV/m contour of the proposed station since 1982. RCI Exh. 1, at 1. He has been active in the Lions Club from 1982 to 1989, belonged to the Chamber of Commerce since 1982, tutored at the Centre Elementary School during 1989-90, acted as chairman for the Easter seals fund raising of Cherokee County in 1985, belonged to local heart and cancer organizations, and coached a youth baseball team during 1989-90. RCI Exh. 1, at 2. Mr. Kelsey has worked at broadcast stations since 1968. *Id.*

AM daytime station preference

25. Mr. Kelsey represents that he has been the owner of the daytime AM station WAGC, Centre, Alabama since late November 1981. RCI Exh. 1. He has worked more than 20 hours per week as the general manager since

February of 1982. RCI promises to divest itself of WAGC within three years of the first date of operation of the proposed FM station.

Auxiliary power

26. Both applicants propose to install auxiliary power sources. Cherokee Exh. 4; RCI Exh. 1. RCI did not decide to install auxiliary power until July 13, 1990 when Mr. Kelsey was deposed. Tr. 150. The parties filed their comparative case statements on May 18, 1990.

Comparative coverage

27. The total areas and populations which the applicants will cover with their respective 1 mV/m contours are as follows:

	Area	Population
Cherokee	1900 sq. km.	33,124
RCI	1860 sq. km.	31,765

28. The area within the applicants' proposed 1 mV/m contour receives five or more services daytime. At night the applicants will provide service as follows:

Area (sq. km.)

Cherokee	Third: 47	Fourth: 99	Fifth: 25
RCI	---	11	37

Population

Cherokee	Third: 542	Fourth: 1602	Fifth: 181
RCI	---	751	690

Jt. Engineering Exh. 1

Diversification of ownership of mass media

29. Neither Cherokee nor any of its principals have any interest in the mass media. Cherokee Exh. 3. RCI is the licensee of daytime AM station WAGC, Centre, Alabama which it will divest within three years of the first day of operation of the proposed FM. RCI Exh. 1, at 3.

CONCLUSIONS

RCI has not established that it is financially qualified and its representations before the Commission about its financial qualifications are not trustworthy or reliable.

30. RCI's showing on the financial issue suffers from three fatal flaws. First, RCI's representations and actions about its financial plans are unreliable and untruthful in material respects. Second, RCI's financial plan was never fully revealed in a timely manner; RCI changed elements of its costs and the assets of its lender during the hearing. Third, RCI has been unable to establish financing for its lowest estimate to build, operate and finance the station.

31. RCI's showing is unreliable, untruthful, and exhibits bad faith. RCI deliberately decided not to determine the cost of its proposal and obtain reasonable assurance for financing its proposal until after it filed its application. The Commission requires that all applicants indicate on application Form 301 whether or not they are financially qualified to construct and operate the station for three months without revenue. RCI filed its application on February 7, 1988. At that time it signified both that it was qualified and unqualified financially. It checked the "yes" box in answer to the question about whether it was financially qualified, but it also represented below the box checked that it was formulating its financial plans and when they were complete it would file an amendment. While RCI claims in its reply pleading that marking the "yes" box was an accident, that is not what John C. Kelsey, purportedly RCI's only stockholder, said at the hearing. On September 5, 1990, Mr. Kelsey said that his intention was to make the Commission believe that he was qualified but with a few reservations which he did not specify. The circumstances that gave rise to Mr. Kelsey's answer on Form 301 were not dictated by lack of time to find financing or prepare the application. He said he decided to apply in 1987, the year before the application was filed. He hired a lawyer in December 1987 and he reviewed the instructions and the application form long before the February 1988 due date. Nevertheless, as early as December 1987, he decided, along with his counsel, to qualify his yes answer on the Form 301. When Mr. Kelsey was asked whether he believed he was qualified when he filed, he said that he was not in the sense the Commission means.

32. RCI did not establish a reliable pattern of action that Mr. Kelsey took to become financially qualified following (or before) the filing of RCI's application. When questioned, Mr. Kelsey indicated that in 1988, he tried to obtain financing from F. H. Boney, who holds the notes on his current station, from Centre's Farmers and Merchants Bank, and from his father, John T. Kelsey. There is no objective evidence that supports those claims and there is evidence that makes them untruthful. Mr. Kelsey initially represented that Mr. Boney provided him with a letter promising a loan in 1988, but the only letter from Mr. Boney in the record is dated a year later, 1989. Moreover, no 1988 letter from Mr. Boney was produced during discovery, although it was asked for. There is no letter or supporting evidence from the Merchants and Farmers Bank which Mr. Kelsey maintains was interested in 1988 in lending him money. Furthermore, he concedes that he never told his lawyer about the bank's interest.

33. What Mr. Kelsey told his father in 1988, or even 1989, about the need for a loan became less certain as the questions became more pointed. While Mr. Kelsey initially said he talked to his father about lending him money in 1988, in the end he said that he really only told his father about his application. There is no objective evidence that he arranged to borrow money from his father to finance the proposal in 1988. The letter from John T. Kelsey, promising to lend $100,000 to his son for this application, is undated but John C. Kelsey said at the hearing that the letter was recently prepared.

34. The only documentary evidence that Mr. Kelsey attempted to provide about financing the proposal in 1989 is the letter from Mr. Boney. It is, however, a letter that RCI does not rely on. When the hearing was designated in February 1990, two years after RCI filed its application, Mr. Kelsey had not arranged financing and he had not made good on his promise to the Commission to do so. At one point, Mr. Kelsey said he viewed the proceeding as being on hold during that period and he implied that he believed no effort to obtain financing was necessary. He said this despite his recognition on the application form

that he needed to determine his cost, find financing, and amend his application. He admitted that, while he discussed with his counsel how to answer the financial qualifications question when the application was filed, he never again discussed filing the promised amendment with counsel for the next two years after he applied and before the proceeding was designated for hearing.

35. But Mr. Kelsey's inaction did not extend to just arranging financing. There was not a written budget for construction in 1988, he said, and he could not remember whether he had one for operating the station for three months. It seems doubtful that there was a budget in written form until four and a half months after the HDO was released, July 13, 1990, the day Mr. Kelsey was deposed. On that day, RCI's counsel presented a hand written budget which counsel had prepared that day. RCI had been asked to provide any budgetary notes Mr. Kelsey might have made and counsel claimed at the deposition that there were some which would soon be produced. Budget notes were produced by RCI, but not until the day the written testimony was exchanged, August 20, 1990, after the period for discovery had ended on August 10, 1990. Mr. Kelsey maintains he made the notes before 1990 but that does not seem to be the case. On June 19, 1990, RCI obtained equipment estimates from the Harris Corporation Broadcast Division. The notes which Mr. Kelsey claims he made "over the years" appear to match the June 19, 1990 estimates Harris provided for an antenna, tower, and studio equipment. Mr. Kelsey also claims he had earlier estimates from Harris which he received unsolicited before the channel was allocated. While Mr. Kelsey referred to them in his testimony to substantiate his notes, he never produced them for examination, although they were asked for.

36. At the prehearing held May 7, 1990, RCI reiterated its intention to arrange its finances and amend its application. And it was directed to do so by the presiding officer. It never did amend. When Mr. Kelsey was asked why RCI did not amend, he said that the applicant became qualified in June 1990 but he changed his mind about amending. He said he could not remember why he changed his mind. Three possibilities present themselves and each shows that RCI was untruthful with the Commission: RCI knew it was not financially qualified in June 1990 and could not amend and Mr. Kelsey did not state the truth about RCI's qualifications at the hearing. RCI knew that it had not attempted to become financially qualified before June 1990 and it knew it could not meet the good cause test for an amendment. Or it did not want to subject its financial plans to the scrutiny of the Commission and Cherokee before the hearing. None of these possibilities are exclusive; there is evidence that RCI was motivated by each of them in the actions it took. They show that RCI did not approach the proceeding in the open and truthful way the Commission expects of applicants.

37. On the day exhibits were exchanged RCI produced documents that raised questions about how it arrived at the cost estimates for its testimony and when the first hearing session began RCI asked to alter the cost estimates provided in its written testimony. It was apparent that RCI was attempting to lower its cost estimates to match the money it could borrow. Between the date RCI filed its written testimony, August 20, 1990, and the day the first hearing session began, September 5, 1990, RCI said it reassessed the cost of building a structure to hold its transmitter. It would not cost $7500, as stated in the written estimate RCI represented, but $3500. The installation of the transmission equipment would not cost $10,500, as represented in the written testimony, but $1,000, Mr. Kelsey said. RCI would achieve this reduction by seeking a waiver of the initial payments from Mid-States Financial Corp. until after the first three months of operation. While those changes may have been supportable, there was no reason why they could not have been part of a plan made at the outset. They also made a thorough examination and testing of RCI's proposal impossible.

38. Mr. Kelsey was unable to explain his different estimates for legal fees. The notes produced on August 20, 1990 purportedly represent Mr. Kelsey's pre-designation estimate; it provides $10,000 for legal fees. The estimate provided at the deposition in July 1990 was $20,000 and the written testimony stated they would be $8,000. It appeared from the written testimony that the $8,000 amount listed was the sum expected to be paid in the future but did not include the money already paid. But Mr. Kelsey explained that he had paid $1,000 originally as a retainer fee and that just before the hearing he paid $2,000, which he borrowed from the Farmers and Merchants Bank. But he also said he had a bill for $5,000 which he had to pay and apparently an $8,000 deferred payment he would pay later. As is the case with those amounts, it is often not possible to tell if Mr. Kelsey's estimates were arrived at through a process of reasoned determination of what the costs would be or whether the amounts were selected to coincide with the amount of money he could raise to finance the proposal.

39. Quite aside from the reliability of RCI's cost estimates is its inability to demonstrate that it has sufficient funds to meet even its lowest cost estimate. Mr. Kelsey said that RCI intends to lease Harris equipment from Mid-States Financial Corp. On June 28, 1990 Mid-States provided a letter stating its interest in leasing RCI the equipment. RCI will need $50,275.12 to pay Mid-States for equipment and construction costs. It will also need $15,853 for three months of operation. The total needed, according to the written testimony RCI exchanged on August 20, 1990, is $66,128. (John C. Kelsey's notes, produced on August 20, 1990, show an estimated need of $131,509.67 and the budget submitted at the deposition shows a requirement of $74,775.12.) RCI proposes to borrow the $66,128.00 from Mr. Kelsey's father, John T. Kelsey. John T. Kelsey has $34,000 on deposit in a bank and $28,459 in a Nuveen tax free bond fund, which can be sold in order to provide the loan to his son. His $62,459 in liquid assets, however, does not cover the amount that RCI needs or the $100,000 he promised to lend. While Mr. Kelsey also wanted to add the $6,000 cash surrender value of his life insurance to his net liquid assets at the hearing, that amount when added to his assets does not provide the $100,000 in liquid assets he promised to lend. RCI has not provided a balance sheet for John T. Kelsey in its testimony in the form required by the instructions to Form 301; that failure makes testing Mr. Kelsey's promise impossible.

40. The manner in which Mr. Kelsey made his promise to his son casts further doubt on the reliability of his promise. When John C. Kelsey was asked if his father wrote the letter promising the loan of $100,000, he at first said yes and then after further questioning admitted that the letter was prepared by counsel and sent to his father.

John T. Kelsey did not make that admission. He said he drafted the letter and had it typed. When he was asked about the requirements for the loan outlined in the letter, however, he said that none of the material elements would apply. The letter requires Mr. Kelsey's son, for example, to file a formal application with him for the loan. Mr. Kelsey said that would not be required. The letter requires a personal guarantee by Mr. Kelsey's son. Mr. Kelsey was so strongly against that provision, he described it as "repugnant, . . . contrary to [his] character." The letter also states that Mr. Kelsey would require collateral. Mr. Kelsey said he would not require collateral. It is evident that Mr. Kelsey signed his name to a letter he never read. He did not even pause to put a date on the letter. It is also evident that Mr. Kelsey has never seriously determined under what conditions he would lend his son money for RCI's proposal and how much money he actually could and would lend him. John T. Kelsey's testimony about his promise to lend John C. Kelsey money for his proposal for this channel is not reliable. RCI cannot be credited with having obtained reasonable assurance of a loan from John T. Kelsey. For all of the reasons just given, it cannot be concluded that RCI has demonstrated that it is financially qualified and would make a reliable, trustworthy licensee.

Cherokee's Motion to Enlarge Issues Against RCI

41. Cherokee moves to enlarge issues against RCI to determine whether Freda Kelsey, John C. Kelsey's spouse, violated the *ex* parte rules when she wrote to the presiding officer about RCI's proposal. Ms. Kelsey wrote to the presiding officer on November 23, 1990, after the close of the record. Ms. Kelsey explained to the presiding officer that she is co-owner of WAGC with her spouse, John C. Kelsey, and that she attended the hearing. She said she apologized if she was violating the rules by writing. In effect, she urged the presiding officer to grant RCI's application despite any weaknesses. The letter was not served on any of the other parties. RCI argues that because the letter is a single incident, two months after the close of the record, which does not address the merits of the case, no issue is warranted. RCI urges that if the letter is an *ex* parte communication, it is not disqualifying because a single violation of the rule would result in sanctions not disqualification.

42. According to Mr. Kelsey's declaration, he did not urge Ms. Kelsey to write the letter and he was not aware that the letter was written. Whether or not Mr. Kelsey was party to the contact is not relevant; Ms. Kelsey is a director and officer of the applicant, RCI. Moreover, Ms. Kelsey claims in her letter to be a co-owner of WAGC(AM) although the record reflects that Mr. Kelsey is the only owner. Because there is only one incident it is not believed that an issue is warranted at this stage of the proceeding because any appropriate sanction would not alter the outcome of the proceeding. If an RCI principal should engage in similar conduct a second time, it might be appropriate to consider dismissing RCI's application. *See* 47 C.F.R. §1.216. If RCI were not financially unqualified, the issue of who owns WAGC would require further explanation. Mr. Kelsey states in his direct testimony that he has been the only owner of WAGC since 1981 and that that is what he has told the Commission. Ms. Kelsey's statement to the Commission is contrary to that representation.

43. The only qualified applicant in this proceeding is Cherokee and its application will be granted.

ACCORDINGLY, IT IS ORDERED that the motion to enlarge issues, filed November 28, 1990 by Cherokee Broadcasting Corporation IS DENIED.

IT IS FURTHER ORDERED that the renewed motion to dismiss application of Radio Centre, Inc., filed November 8, 1990 IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the petition for leave to amend and amendment, filed September 4, 1990 by Cherokee Broadcasting Corporation IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the motion to correct the transcript, filed September 27, 1990 by Cherokee Broadcasting Corporation IS GRANTED.

IT IS FURTHER ORDERED that the consent motion for extension of time in which to file opposition to renewed motion to dismiss, filed November 20, 1990 by Radio Centre, Inc. IS GRANTED.

IT IS FURTHER ORDERED that the request for extension of time in which to file opposition to motion for enlargement of issues, filed December 12, 1990 IS GRANTED.

IT IS FURTHER ORDERED that the application of Radio Centre, Inc. (File No. BPH-880209MF) IS DENIED and the application of Cherokee Broadcasting Corporation (File No. BPH-880204MJ) for a construction permit for a new commercial FM station on Channel 290A in Centre, Alabama IS GRANTED.[2]

IT IS FURTHER ORDERED that the application of Baker Enterprises, Inc. (File No. Bph-880210MO) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Mr. Bernard filed proposed findings and a reply for the applicant and withdrew as counsel on December 12, 1990. Mr. Stone filed a notice of appearance on December 24, 1990.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend the Radio Control (R/C) Radio Service Rules to Permit Model Surface Craft Channels to be Used for the Remote Control of Industrial Cranes.	RM-6665

MEMORANDUM OPINION AND ORDER

Adopted: March 19, 1991; Released: March 25, 1991

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. By *Order* of November 16, 1989,[1] the Acting Chief, Private Radio Bureau, granted a temporary waiver of Section 95.207 of the Commission's Rules, 47 C.F.R. § 95.207, to customers of Robinson Engineering Company (Robinson) allowing them to continue to engage in bridge crane operations on model surface craft or model aircraft channels until June 30, 1993, provided that such operation causes no harmful interference to model surface craft or model aircraft. This *Order* denies a petition for partial reconsideration of that action, filed by the Academy of Model Aeronautics (AMA). In its petition, AMA requested that the temporary waiver be shortened to 180 days.

II. BACKGROUND

2. In its petition for partial reconsideration, AMA states that the temporary authorization time period that the Commission has allowed to Robinson's customers to continue to operate on model surface craft or model aircraft channels is unreasonably long. Instead of terminating those customers on those channels on June 30, 1993, AMA states that their operations should have been terminated 180 days after the action taken by the Acting Chief, Private Radio Bureau.[2] In support of its request, AMA reiterates the same arguments that it advanced in its opposition to Robinson's petition for rule making, *i.e.*, that there are private land mobile radio service frequencies available to Robinson's customers, and that safety concerns demand a speedy cessation of operation on the model surface craft and model aircraft frequencies. [3] Also, AMA notes that the normal time for processing Part 90 private land mobile applications is approximately 60 to 90 days.[4]

3. Robinson filed an opposition to AMA's petition for partial reconsideration. Robinson states that AMA completely fails to comprehend the extent of its predicament created by not being able to use the subject Radio Control (R/C) Radio Service channels. Robinson describes the steps that it and its customers must take in the process of finding other suitable frequencies, such as commencing frequency coordination procedures, obtaining type acceptance approval from the Commission for equipment modifications, and terminating the manufacturing and marketing of industrial bridge crane control devices until new frequencies and eligible users can be determined. All of this, according to Robinson, will be time-consuming, difficult, and expensive.[5] Robinson, therefore, opposes any transition period shorter than that provided in the original *Order*.[6] Further, Robinson asserts that AMA's contention that the general public's safety interests will be adversely affected is wholly unsupported.[7]

4. In its reply to Robinson's opposition, AMA states that Robinson should not be allowed to benefit from its failure to be aware in 1982 that the R/C channels were restricted to recreational use. The AMA also reiterates its argument that there are safety hazards in the continued use of the R/C channels for controlling industrial bridge cranes.[8]

III. DISCUSSION

5. At issue here is whether the temporary period which expires June 30, 1993, and which allows bridge crane operations on R/C model surface craft or model aircraft channels should be shortened. We are not persuaded by AMA's arguments that the time period allotted should be changed. As Robinson states in its opposition, a number of steps must be taken both by Robinson and its customers to comply with the Bureau's decision in this matter. These steps take time. We believe that the time period allotted, more than 3 years, will allow Robinson and its customers sufficient time to make the changes needed. Further, we believe that model surface craft and model aircraft operations will not be seriously affected during this period.

6. As to AMA's interference arguments, the temporary waiver and authorization were granted subject to no harmful interference being caused to model craft operations. Further, Robinson's customers were required to advise the Bureau of their intention to avail themselves of the temporary waiver and authorization. The Bureau has in its files notifications from 128 users indicating the locations where bridge crane operations on R/C channels are currently taking place. This information is available to concerned individuals so that they can be informed of the possibility of interference to their model craft operations near these locations.

IV. CONCLUSION

7. The AMA's petition for partial reconsideration requesting that the temporary waiver and temporary authorization extended to Robinson's customers, ending June 30, 1993, be shortened to 180 days is not persuasive. IT IS THEREFORE ORDERED, pursuant to Sections 0.331 and 1.429 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.429, that AMA's petition for partial reconsideration of the *Order* of November 16, 1989, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] 5 FCC Rcd 751 (1990)

[2] AMA reconsideration petition at 3 and 4.

[3] *Id.* at 4.

[4] *Id.* at 3.

[5] Robinson's opposition at 2 and 3.

[6] *Id.* at 3.

[7] *Id.* at 4.

[8] AMA's reply at 2 and 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

UNITED STATES INFORMATION AGENCY

For Assignment of License of
Television Station Channel 13
Key West, Florida

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1991; Released: March 26, 1991

By the Commission:

1. On February 16, 1990, the President signed into law the Television Broadcasting to Cuba Act (Act).[1] The Act, *inter alia*, directs the Commission to assign a "suitable frequency" for the purpose of broadcasting television programming to Cuba. This programming is to provide "news, commentary, and other information about events in Cuba and elsewhere to promote the cause of freedom in Cuba," and is deemed by the Act to be in the national interest. These broadcasts are to be known as the Television Marti Service (TV Marti).

2. A comprehensive study begun in 1988 by a special TV Marti Task Force concluded that television Channel 13 is the only suitable channel for television broadcasting to Cuba, based on considerations of VHF television usage in Florida and Cuba and the virtual absence of UHF receivers in Cuba. The Task Force was an intragovernmental group which included representatives of the United States Information Agency (USIA), the Voice of America (VOA), the National Telecommunications and Information Administration (NTIA), the Electromagnetic Compatibility Analysis Center of the Department of Defense, and the Federal Communications Commission. Briefly, the Task Force concluded that the use of any channel from 2 through 12 to broadcast from U.S. territory to Havana would either cause interference to an authorized service, would receive unacceptable interference, or both.

3. On March 25, 1990, test broadcasts to Cuba were begun on Channel 13 from government facilities on the Florida Keys. The test broadcasts were conducted under authority of an experimental license issued by NTIA with Commission concurrence pursuant to a time sharing agreement between the USIA and Palmetto Broadcasters Associated for Communities, Inc. (Palmetto), the licensee of a noncommercial educational television station serving Key West, Florida on Channel 13.

4. The Act defers obligation or expenditure of funds authorized to the USIA for TV Marti until the President determines that the test of television broadcasting to Cuba is feasible and will not cause objectionable interference to the broadcasts of domestic licensees. On August 26, 1990, the President made such a determination and further determined that TV Marti should continue television broadcasting to Cuba. On August 28, 1990, the Commission granted USIA a temporary authorization to continue operating on Channel 13 on a time-sharing basis mutually agreeable to the USIA and Palmetto.

5. Section 243(d)(1) of the Act states that "the Federal Communications Commission shall assign by order a suitable frequency to further the national interests expressed in this part, except that no such assignment shall result in objectionable interference with the broadcasts of any domestic license." As discussed above, the Commission has determined that Channel 13 is the only suitable frequency to fulfill the mandate of the Act. On September 27, 1990, USIA formally requested the assignment of Channel 13 to the TV Marti Service. On October 26, 1990, Palmetto voluntarily surrendered for cancellation its license for Channel 13.[2]

6. Section 243(d)(3) of that Act states that "For purposes of Section 305 of the Communications Act of 1934, a television broadcast station established for purposes of this part shall be treated as a government station, but the Federal Communications Commission shall exercise the authority of the President under such section to assign a frequency to such station." Based on the directives of the Act, and in response to USIA's September 27, 1990, request, the Commission is hereby assigning Channel 13 to USIA for use by the VOA's TV Marti facilities. The technical parameters of this authorization, designated to preclude objectionable interference with the broadcasts of any domestic licensee, pursuant to Section 243(e)(1) of the Act, are attached as Appendix A.[3]

7. We shall also add the following footnote to the Television Table of Allotments to indicate usage of this frequency by TV Marti:

City	Channel No.
Key West, Florida	8, *13[7], and 22+

[7] Because of the proximity of the operation of TV Marti on Channel 13 to the vacant allotment of Channel 13 in Key West applications will not be accepted for the Channel 13 Key West allotment until the TV Marti operations on Channel 13 are permanently discontinued.

Since this change merely carries out the mandate of the TV Marti Act, and reflects foreign policy determinations made by Congress and the President, we find for good cause that public notice and comment thereon is unnecessary. *See* 5 U.S.C. Section 553(a)(1), (b)(3)(B). As TV Marti is already using this channel under a temporary authorization, the note to Section 73.606 is made effective immediately.

8. Accordingly, IT IS ORDERED, That Channel 13 is hereby assigned to the United States Information Agency for use by the Voice of America's TV Marti facilities, pursuant to the directives of the Television Broadcasting to Cuba Act. At such time as USIA no longer needs Channel 13 for TV Marti it will become available for noncommercial educational use.

9. IT IS FURTHER ORDERED, That effective immediately Section 73.606 of the Commission's Rules is amended as reflected above in paragraph 7.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parameters for Broadcasting by the TV Marti Service

A. *Technical Characteristics of the Station*

Location: Lat. 24 40 00 N, Long. 081 30 00 W

Frequency: VHF TV Channel 13 (210-216 MHz) with +10 kHz visual carrier off-set

Frequency Stability: +/- 500 Hz

Power: 650 W (adjustable)

Maximum EIRP: 33 kW

Antenna: Planar Array

Mainbeam gain approx. 15 dBi

Beamwidth (3 dB) approx. 18^0

Backlobe max. gain -30 dB below mainbeam

Antenna Height: 10,000 feet nominal

Pointing accuracy, azimuth: +/- 0.5 degree RMS nominal

B. *Operating Conditions*

1. The station must cease operations immediately if interfence is caused to other authorized stations.

2. At a height of 10,000 feet, the station is not to exceed a maximum EIRP of 33 watts from 320^0 E of true North to 75^0 E in azimuth and from $+/-90^0$ from horizontal, in order to produce a maximum field strength at the WTVT Tampa grade B contour not to exceed 28 dBu.

3. The maximum deviation of the beam pattern from its nominal azimuth and elevation must be maintained at less than +/- 5o while the station is in operation.

4. NTIA and the FCC will be provided with an on-site point of contact who is responsible for regular operations and who has the authority to discontinue the operations upon notification by NTIA or the FCC.

C. *With Limited Assignment*

Channel 13, Key West, Florida is being assigned on the condition that it be used exclusively for TV Marti and that the channel will revert to non-commercial use under authority of the Federal Communications Commission when its use for TV Marti is terminated.

FOOTNOTES

[1] This Act, Title II, Part D, Sec. 241, is contained in the *Foreign Relations Authorization Act, Fiscal Years 1990 and 1991*, Pub. L. No. 101-246 (signed February 16, 1990).

[2] Palmetto had entered into an asset purchase agreement on April 13, 1990 with Jacksonville Educators Broadcasting, Inc. for the sale of Channel 13. On May 8, 1990, the parties filed an application for assignment of license. On October 17, 1990 the Commission dismissed the application. *Palmetto Broadcasters Associated for Communities, Inc.*, 5 FCC Rcd. 6379 (1990), *reconsideration dismissed* FCC 91-_____ , released February _____, 1991.

[3] In order for the Commission to ensure efficient utilization of the spectrum, USIA is requested to advise the Commission of the status of its operation of Channel 13 on February 1, 1992 and at five-year intervals thereafter. Should USIA seek to permanently discontinue its operation on Channel 13, it should notify the Commission of such intent as soon as possible.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 88-387

In the Matter of

Amendment of Environmental Rules; Amendment of Part 63 of the Commission's Rules Relating to Common Carriers

SECOND REPORT AND ORDER

Adopted: February 7, 1991; Released: March 27, 1991

By the Commission:

INTRODUCTION

1. In the *First Report and Order* in this proceeding,[1] the Commission amended section 1.1312 of its Rules,[2] to require applicants and licensees for radio facilities that may significantly affect the environment but do not require pre-construction authorization to submit an Environmental Assessment (EA) and undergo Commission environmental review prior to initiation of construction. In this *Second Report and Order*, we adopt our proposal [3] to apply the same environmental processing requirements to the construction of interstate telecommunications lines[4] by non-dominant, facilities-based domestic common carriers. Section 63.07 of our rules[5] is thus amended to require non-dominant carriers to submit EAs and obtain Commission approval,[6] prior to the construction (or extension) of interstate lines that may have a significant environmental effect.[7] We are also adopting, with minor editorial modifications, our proposal in the *Further Notice* to establish a categorical exclusion from environmental processing requirements for the installation of wire or cable over existing routes.[8]

2. Comments and/or reply comments to the *Further Notice* were filed by American Telephone and Telegraph Company (AT&T), United States Telephone Association, Williams Telecommunications Group, Inc. (WTG), and U.S. Sprint Communications Company Limited Partnership (US Sprint). The views of these commenters are discussed below in the context of our specific rule amendments.

DISCUSSION

A. Amendment of Section 63.07

3. The commenters, with the exception of WTG, supported or did not oppose the Commission's proposed amendment to section 63.07. WTG contended that the procedural mandates of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4395, do not apply to non-dominant common carriers' construction of wire or cable facilities.[9] WTG argued that since the Commission exempted non-dominant common carriers from section 214 filings, construction by non-dominant carriers does not involve any federal action that triggers the procedural mandates of NEPA and other environmental statutes. Moreover, WTG claimed that the proposed amendment should not be adopted because: (1) construction by non-dominant carriers is already subject to environmental review by other state and federal government agencies; (2) covenants with landowners and carriers' desire to protect their own goodwill to ensure protection of the environment; (3) cable facilities of non-dominant carriers are mostly buried and do not pose a significant risk to the environment; (4) cable installation will benefit the environment by reducing use of microwave towers, which produce radiofrequency radiation; and (5) the Commission lacks sufficient resources to implement the proposed rule.[10]

4. We disagree with WTG's arguments and will adopt the proposed rule. Our rule is fully consistent with NEPA and other federal environmental statutes. Absent an irreconcilable and unavoidable conflict between the dictates of NEPA and a federal agency's statutory authority,[11] which does not exist here, NEPA requires a federal agency to consider environmental issues in its decisionmaking process to "the fullest extent possible."[12] Among other things, a federal agency must develop a "systematic, interdisciplinary" approach to ensure that its actions reflect an integrated consideration of environmental concerns with other technological, economic and social issues.[13] Moreover, unlike WTG, we think that our authorization of the construction at issue is clearly a federal action triggering NEPA. The fact that a carrier's construction of facilities is authorized by rule rather than by action on an individual application does not eliminate the existence of federal action or affect our obligation to comply with NEPA and other federal environmental statutes.[14]

5. Contrary to WTG's assertions, the Commission's experience with AT&T has also shown that the construction of wire and cable facilities, even though buried, may significantly affect the environment, particularly with respect to Indian religious and buried archaeological sites as well as to some endangered species. As US Sprint noted, for example, "a carrier seeking to replace its overhead transmission lines with buried cable may inadvertently dig up and perhaps destroy Indian religious sites or archaeological items. . . ."[15] Such construction should be evaluated and considered under NEPA, the American Indian Religious Freedom Act, the National Historic Preservation Act and the Endangered Species Act,[16] regardless of whether the carrier involved is dominant or non-dominant. In this regard, we note that the Commission's decision to exempt non-dominant common carriers from filing section 214 applications was premised on economic, not environmental, factors.[17] There is simply no factual or legal basis for exempting non-dominant carriers from our environmental requirements.[18]

6. With regard to WTG's claim that state law or non-governmental incentives may help protect the environment, that fact does not relieve the Commission of its statutory responsibilities. As to the possibility that other federal agencies may be conducting environmental review, our rules already avoid any duplicative federal environmental review. *See* 47 C.F.R. § 1.1311(e). Moreover, regardless of whether buried wire or cable facilities are environmentally preferable to microwave structures, the Commission must still review environmental issues in

situations where wire or cable facilities may significantly affect the environment. Finally, we address US Sprint's and WTG's concern regarding our lack of resources and possible service delays relating to Commission environmental review.[19] In situations where there may be a significant effect on the environment, we believe any delay in order to evaluate environmental risks is appropriate. We will, of course, endeavor to process filings under the new rule as expeditiously as possible.[20] In this connection, carriers may consider expediting environmental review of construction involving historic properties, Indian sites or endangered species by initiating a programmatic agreement with the Advisory Council on Historic Preservation,[21] early consultation with the Fish and Wildlife Service[22] or negotiations with affected Indian tribes,[23] respectively.

B. Categorical Exclusion

7. AT&T, US Sprint and WTG all supported a categorical exclusion for existing routes, although they characterized our proposal as too restrictive and suggested various revisions. AT&T and WTG stated that the proposed rule's reference to an exclusion for the "installation of additional wire or cable over existing routes" could be read as applying only to telecommunication routes. They suggested that the categorical exclusion be broadened to include existing corridors used for other purposes, *e.g.*, highways, railroads, and utilities.[24] US Sprint agreed that the categorical exclusion should apply to such established corridors, but stated that AT&T and WTG's revisions were too broad. US Sprint suggested that the categorical exclusion be tailored to coincide with the type of existing route, so that, for example, underground construction along an existing aerial route would not be categorically excluded.[25] Finally, AT&T and WTG sought clarification as to whether the existing categorical exclusion for the mounting of antenna(s) on an existing building or tower[26] encompasses the installation of a new tower on an existing building.[27]

8. We continue to believe that the use of existing routes will not have a significant effect on the environment and therefore should be categorically excluded from our environmental processing rules.[28] The proposed categorical exclusion of "existing routes" was intended to encompass existing corridors of prior or permitted use for both non-telecommunications and telecommunications purposes, and we are so clarifying the amendment, as suggested by commenters. In addition, we are adopting US Sprint's suggestion that section 1.1306(b) Note 1 reflect that the exclusion applies to proposed aerial or underground routes that will utilize established aerial or underground corridors, respectively. Finally, the existing Note clearly states that the mounting of a new antenna on an existing building will be categorically excluded where the mounting will not affect historic sites or result in unsafe emissions of radiofrequency radiation. Therefore, we shall not adopt AT&T's and WTG's suggestion that we further clarify this Note.

CONCLUSION

9. In view of the foregoing and pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r); section 4332 of the National Environmental Policy Act, 42 U.S.C. § 4332; section 470-f of the National Historic Preservation Act, 16 U.S.C. 470-f; section 1536 of the Endangered Species Act, 16 U.S.C. § 1536; and section 1996 of the American Indian Religious Freedom Act, 42 U.S.C. § 1996, IT IS ORDERED that Parts 1 and 63 of the Commission's rules ARE AMENDED as set forth in the Appendix, EFFECTIVE 30 days after publication in the Federal Register.[29]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended: 47 U.S.C. 154, 303, Implement, 5 U.S.C., 552, unless otherwise noted.

2. Section 1.1306 is amended by revising Note 1 to read as follows:

§ 1.1306 Actions which are categorically excluded from environmental processing.

* * * * *

Note 1: The provisions of § 1.1307(a) requiring the preparation of EAs do not encompass the mounting of antenna(s) on an existing building or antenna tower unless § 1.1307(a)(4) is applicable. Such antennas are subject to § 1.1307(b) and require EAs if their construction would result in human exposure to radiofrequency radiation in excess of the applicable health and safety guidelines cited in § 1.1307(b). The provisions of §§ 1.1307(a) and (b) do not encompass the installation of aerial wire or cable over existing aerial corridors of prior or permitted use or the underground installation of wire or cable along existing underground corridors of prior or permitted use, established by the applicant or others. The use of existing buildings, towers or corridors is an environmentally desirable alternative to the construction of new facilities and is encouraged.

* * * * *

3. Section 1.1312 is amended by redesignating paragraph (d) as paragraph (e) and revising it and adding a new paragraph (d) to read as follows:

§ 1.1312 Facilities for which no pre-construction authorization is required.

* * * * *

(d) If, following the initiation of construction under this section, the licensee or applicant discovers that the proposed facility may have a significant environmental effect, it shall immediately cease construction which may have that effect, and submit the information required by § 1.1311. The Commission shall rule on that submission and complete further environmental processing (if invoked), *see* § 1.1308, before such construction is resumed.

(e) Paragraphs (a) through (d) of this section shall not apply to the construction of mobile stations.

4. The authority citation for Part 63 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 214, 48 Stat. 1075, as amended; 47 U.S.C. 214.

5. Section 63.07 is amended by adding a new paragraph (c) to read as follows:

§ 63.07 Special procedures for non-dominant domestic common carriers.

* * * * *

(c) Non-dominant, facilities-based domestic common carriers subject to this section shall not engage in any construction or extension of lines that may have a significant effect on the environment as defined in § 1.1307 without prior compliance with the Commission's environmental rules. *See* § 1.1312.

FOOTNOTES

[1] 5 FCC Rcd 2942, 55 Fed. Reg. 20,396 (1990).

[2] 47 C.F.R. § 1.1312.

[3] *Further Notice of Proposed Rulemaking*, 5 FCC Rcd 2950, 55 Fed. Reg. 20,400 (1990) (*Further Notice*).

[4] *See* 47 U.S.C. § 214(a).

[5] 47 C.F.R. § 63.07.

[6] *See* 47 C.F.R. §§ 1.1308, 1.1311, 1.1312. Under new section 63.07, a carrier will be required to comply with section 1.1312, as revised in the *First Report and Order*. Dominant carriers already are required to comply with our environmental rules as part of the section 214 process. *See, e.g.*, 47 C.F.R. § 63.01(q).

[7] *See* 47 C.F.R. § 1.1307.

[8] *Further Notice*, 5 FCC Rcd at 2950. Additionally, the Commission is amending section 1.1312, 47 C.F.R. § 1.1312, to include a requirement that construction pursuant to that section cease upon discovery that the facility may have a significant effect on the environment. This requirement was discussed in the text of the 5 FCC Rcd at 2943, but was inadvertently omitted from the text of the rule.

[9] WTG Comments at 3-5; WTG Reply Comments at 2-3.

[10] WTG Comments at 5-9.

[11] *See Flint Ridge Development Co. v. Scenic Rivers Association*, 426 U.S. 776 (1976) (NEPA compliance impossible where a statute requiring private developers' disclosure filings with HUD severly restricted HUD's discretionary authority and contained time limitations that irreconcilably and unavoidably conflicted with NEPA).

[12] *See* 42 U.S.C. § 4332.

[13] *Id.* NEPA does not require agencies to reject proposals that may or will significantly affect the environment. Rather, NEPA requires agencies to reach fully informed decisions that address and balance environmental issues with other issues within their mandates. *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

[14] *See* 40 C.F.R. §§ 1502.4(b)(c), 1508.17, 1508.18. The cases cited by WTG are inapposite. In both *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980), and *Citizens for Responsible Growth v. Adams*, 680 F.2d 835 (1st Cir. 1982), the court found no federal action under NEPA. Neither case, however, involved the question of whether federal action was involved in a situation where an agency exercises its licensing authority by determining in advance that projects by regulated entities may proceed without the filing and grant of applications in each specific instance.

[15] US Sprint Reply Comments at 3.

[16] *See* 42 U.S.C. § 4331(b)(4); 42 U.S.C. § 1996; 16 U.S.C. § 470-470w-6; 16 U.S.C. §§ 1531-1543; 40 C.F.R. § 1508.27(8); 36 C.F.R. Part 800; *see also* 47 C.F.R. § 1.1307(a)(3)(4)&(5).

[17] *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor* (CC Docket No. 79-552), *Second Report and Order*, 93 FCC 2d 54 (1982).

[18] *See Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 725 F.2d 761 (D.C. Cir. 1984) (for environmental purposes, agencies must apply the same regulatory approach to similiarly situated projects and may not subject some proposals to environmental regulation while exempting others).

[19] US Sprint Reply Comments at 4; WTG Comments at 9, 12.

[20] Given the consultation requirements of other applicable federal environmental statutes, *see* 47 C.F.R. § 1.1308(b) Note 1, the Commission cannot establish definite time period limitations as suggested by US Sprint. *See* US Sprint Reply Comments at 4.

[21] *See* 36 C.F.R. § 800.13.

[22] *See* 50 C.F.R. §§ 402.08, 402.11, 402.12(c).

[23] 42 U.S.C. § 1996.

[24] AT&T Comments at 5-6; AT&T Reply Comments at 6-7; WTG Comments at 9-11; WTG Reply Comments at 3-4.

[25] US Sprint Reply Comments at 3.

[26] *See* 47 C.F.R. § 1.1306(b) Note 1.

[27] AT&T Comments at 6; WTG's Reply Comments at 4.

[28] *See Further Notice*, 5 FCC Rcd at 2950.

[29] Pursuant to the Paperwork Reduction Act, the Office of Management and Budget (OMB) approved the Commission's proposed rule amendments on July 10, 1990, OMB Control No. 3060-0448. Because the only changes to the information collection requirements approved by OMB are not substantive or material, no further approval is required. *See* 5 C.F.R. § 1320.13(g).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-33

In the Matter of

Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies — RM 6539

NOTICE OF PROPOSED RULE MAKING AND ORDER

Adopted: February 13, 1991; Released: March 27, 1991

By the Commission: Commissioner Duggan issuing a statement.

I. INTRODUCTION

1. By this Notice of Proposed Rule Making, we seek comment on whether we should modify our current policy governing resale of cellular service. In particular, we seek comment on whether we should require a facilities-based cellular carrier to provide resale capacity to its facilities-based competitor in the same market. We also clarify our requirement that resale capacity be provided on a non-discriminatory basis. In addition, we deny the petition to expand the Rule Making proceeding filed by the National Cellular Resellers Association (NCRA).

II. BACKGROUND

2. The Commission's resale policy was first established in *Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976) (*Resale and Shared Use Decision*), *modified on other grounds*, (*Resale and Shared Use Reconsideration Order*), 62 FCC 2d 588 (1977), *aff'd sub nom. AT & T v. FCC*, 572 F. 2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978). In that decision, the Commission held that provisions in carrier tariffs which had the effect of precluding the resale[1] of private line service were unlawful. The Commission found that tariff provisions restricting resale were "unjust and unreasonable" in violation of Section 201(b)[2] of the Communications Act (Act) and "unlawfully discriminatory" under Section 202(a) [3] of the Act.[4]

3. In *Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 FCC 2d 167, 193 (1980) (*Resale of Switched Services*), the Commission adopted a blanket prohibition on tariff provisions restricting the resale of common carrier domestic public switched network services, including MTS and WATS switched voice services, finding such restrictions to be unlawful under Sections 201(b) and 202(a) of the Act. For switched services, the Commission also found that an unrestricted resale policy would produce public benefits similar to those set forth in the *Resale and Shared Use Decision*.[5]

4. In *Cellular Communications Systems*, 86 FCC 2d 469, 511 (1981) (*Cellular Systems*), *modified*, 89 FCC 2d 58 (1982) (*Reconsideration Order*), *further modified*, 90 FCC 2d 571 (1982) (*Further Reconsideration Order*), *appeal dismissed sub nom. U. S. v. FCC*, No. 82-1526 (D.C. Cir. March 3, 1983), the Commission found that restrictions on cellular resale were contrary to the public interest. In reaching this decision, it relied on reasons similar to those set forth in the *Resale and Shared Use Decision* and *Resale of Switched Services*. Accordingly, pursuant to the Commission's licensing authority set forth in Section 309 of the Act,[6] the Commission stated that it would grant cellular radio licenses on the condition that no restrictions on resale be imposed.[7]

III. DISCUSSION

A. Provision of Resale Capacity to a Facilities - Based Carrier

1. Background of the CTC/NYNEX Proceeding

5. On March 14, 1986, Cellular Telephone Company (CTC), the nonwireline licensee in New York City, filed a petition requesting a declaratory ruling that it and other nonwireline cellular carriers should not be required to provide resale service to the wireline cellular competition in the same market. It argued that the elimination of the competitor resale requirement would enhance competition and further the goals of the antitrust laws. In its April 17, 1986 letter to CTC,[8] the Bureau concluded that CTC was required to provide resale capacity to NYNEX Mobile Communications Retail Company (NYNEX-R).[9] In its application for review, CTC argued that the Bureau misapplied the Commission's cellular resale policies.

6. The DOJ filed comments in support of CTC's position. The DOJ contended that the Commission's desire to facilitate competition between non-facilities based carriers, and provide consumers the benefits of competition, does not justify requiring resale where both facilities-based carriers in the same market are fully operational and one facilities-based carrier is attempting to obtain resale capacity from the other facilities-based carrier. The DOJ also argued that allowing firms to select their own distribution channels furthers economic efficiency, promotes interbrand competition[10] and consumer welfare. Furthermore, the DOJ contended that CTC's refusal to permit NYNEX-R to resell CTC's service will not harm competition and may actually lessen the risk of collusion between the two facilities-based carriers. Finally, the DOJ argued that in the absence of clear market failure, the Commission should not interfere with the exercise of the carrier's business judgment.[11]

7. On October 7, 1988, the Commission released a *Memorandum Opinion and Order* (*Order* or *CTC/NYNEX Order*) [12] affirming the Common Carrier Bureau's (Bureau) letter of April 17, 1986. Upon reviewing the history of the resale policy, the Commission concluded that restrictions on resale were unlawful under any circumstances and that CTC and the DOJ had failed to justify a departure from this policy. In the *Order*, the Commission indicated that it would be worthwhile to review its resale policy by treating the comments filed by CTC and the United States Department of Justice (the DOJ) as petitions for Rule Making. The Commission also invited comments concerning the extent to which it should continue to apply the resale policy.[13] We have received 20 com-

ments and 17 reply comments filed by wireline and nonwireline cellular operators, trade associations, resellers, agents, and state public utility commissions.[14]

2. Comments

8. While the commenters unanimously support the need for an unrestricted resale policy during the "headstart" period,[15] they are divided on the issue of whether the current cellular resale policy should be maintained. For example, PacTel, McCaw, Centel, GTE and Contel support CTC's position that a facilities-based carrier should not be required to provide resale capacity to its facilities-based competitor in the same market.[16] They agree with CTC's and the DOJ's arguments that a requirement that a facilities-based operator provide resale capacity to a facilities-based competitor is contrary to the Commission's goal of encouraging new competitors to enter the market and is, therefore, unnecessary at the end of the "headstart" period. They assert that once the facilities-based carriers are fully operational, an absolute resale requirement diminishes facilities-based competition in the marketplace.

9. Those parties supporting the CTC and the DOJ position argue that a resale requirement poses several threats to interbrand competition in the market. They maintain that a Commission policy requiring cellular carriers to provide resale capacity to their competitors: (1) encourages carriers acquiring resale capacity from their competitors to defer making capital expenditures to expand their system by subscribing to a large block of numbers on the competing carrier's system; (2) diminishes a licensee's incentive to improve its system; (3) serves as a disincentive for a reseller who is also a facilities-based carrier to expand or upgrade its own system; (4) leads to minimal price competition and inferior cellular service; and (5) requires the competing carrier to expand its capacity solely to meet its competitor's resale demands.

10. Several of the parties maintain that the Commission, in *Cellular Systems*, never intended to require facilities-based cellular carriers to provide resale capacity to their facilities-based competitor. This is the case, they argue, because such a policy does not promote the policy objectives enunciated in the *Resale and Shared Use Decision*. Because of the cellular industry's duopoly structure,[17] and the differences between the the market used by interexchange resellers in the *Resale and Shared Use Decision* and the cellular marketplace, they do not believe that resale by one facilities-based cellular carrier of its competitor's services will result in cost-based pricing or better management in the cellular industry, or reduce wasted communications capacity. Rather, these parties believe that a resale requirement between competing carriers might discourage such progress by allowing a facilities-based carrier to delay making any improvements to its cellular system and obtain a "free ride" from the other facilities-based carrier's financial investment in plant and equipment.

11. A few of the commenters supporting CTC's position argue that resale restrictions do not violate the just and reasonable standard of Sections 201(b) and 202(a) of the Act. They argue that what is just and reasonable under the Act depends on the circumstances presented in each case, citing *NARUC v. FCC*, 737 F.2d 1095, 1136 (D.C. Cir. 1984). These parties maintain that where, as here, resale restrictions between facilities-based operators after the "headstart" period would promote competition, a resale restriction would not violate Sections 201 and 202 of the Act.[18]

12. U.S. West, NYNEX, NATA, Vanguard, BellSouth, Telocator and the New York Department of Public Service favor the retention of the Commission's current resale policy without any modifications. They all agree that unrestricted resale is required by Sections 201(b) and 202(a) of the Act and Commission case precedent. In this regard, they assert that the Commission made clear in its *CTC/NYNEX Order* that its resale policy applies to nonwireline and wireline carriers alike, regardless of whether the carrier owns communications facilities, and is not limited to situations involving the "headstart" period. These parties argue that the burden of proof as to whether resale restrictions are reasonable rests on those parties favoring such restrictions. Furthermore, they maintain that the parties supporting CTC's position have presented no evidence, merely speculation and conjecture, to justify any deviation from the current cellular resale policy.

13. Despite CTC and the DOJ's argument that restrictions on resale are permissible under federal antitrust laws, the commenters supporting unrestricted resale assert that it does not necessarily follow that the Commission should allow resale restriction generally. This is the case, they maintain, because the Commission's resale policy goes beyond the requirements of antitrust law and advances several policy objectives, such as ensuring that the opportunity to resell is available to both wirelines and non-wirelines alike, fostering innovation in service and technology, serving as a check on potential anticompetitive practices, and promoting the most efficient use of the radio spectrum.

14. All the parties supporting unrestricted resale believe that CTC's competitive injury arguments are speculative and unsupported. As to CTC's concerns that requiring it to provide resale capacity to NYNEX-R would undermine its strategy of establishing superior channels of distribution and would hinder its ability to distinguish itself from its competitor, NYNEX asserts that this argument is undermined by the fact that independent resellers are selling both wireline and nonwireline services with no such competitive injury.[19] Moreover, as to CTC's allegation that an unrestricted resale requirement will enable NYNEX to obtain information about CTC's marketing plans, most of the parties favoring unrestricted resale do not believe that resellers are privy to confidential information regarding their competitors.[20] Finally, with respect to CTC's concern that a facilities-based carrier reselling its competitor's services will have the ability to injure its facilities-based competitor by withdrawing its resale customers, the parties contend that it is unlikely that a facilities-based reseller would move its customers abruptly, due to the inconvenience that would be imposed on its customers as a result of the need to reprogram the cellular telephones on its system.

3. Discussion

15. After having carefully considered the comments, we continue to support our current policy prohibiting restrictions on cellular resale in most instances. Furthermore, we believe that our policy requiring the two facilities-based carriers in each market to provide resale capacity to each other serves the the public interest up to the point that a facilities-based carrier requesting resale is fully operational. This Notice seeks comment on a pro-

posed rule providing that a licensee shall permit resale of its services in all circumstances, except that it shall not be required to provide resale capacity to its facilities-based competitor in the same market after that competitor who is requesting resale is fully operational.

16. With respect to facilities-based competitors in the cellular industry, an important public interest reason for prohibiting resale restrictions is to offset any competitive advantage one carrier may have because it is granted a construction permit prior to its competitor. Indeed, no one disputes the value of requiring resale prior to the time the second carrier in the market begins providing service to the public over its own facilities. If the time lag is significant between the first and second carrier's start of operations, the first carrier will have had a significant opportunity to expand its coverage area while the second carrier builds out its system. Therefore, the rationale supporting resale of a competitor's services can continue to exist even after the second carrier's initial facility becomes operational. At some point, however, the second carrier will have had sufficient opportunity to build out its system. This point in time will vary from market to market depending on many factors, including the length of the time lag, state or local zoning approval delays, weather and site availability for additional transmitter locations, to name just a few. We believe that continuing to prohibit resale restrictions on competitors serves the public interest during the transition to full facilities-based competition. However, once the second carrier is fully operational, the rationale for prohibiting resale restrictions between facilities-based licensees may cease to exist.

17. We tentatively conclude that the most appropriate time to cease the competitor resale requirement should be when the five year fill-in period ends for the facilities-based carrier that is seeking to resell the competitor's capacity.[21] At this time, that carrier will have had an opportunity to build out its system fully and to compete using its own facilities. After that carrier's five-year fill-in period has expired, there is little reason why the second carrier should continue to rely on the competing carrier's system. In most cases the carrier will be economically motivated to begin all sales from its own facilities as early as possible to reduce its costs and to maintain complete control over its operations to serve its customers. However, elimination of the resale requirement to a fully operational competitor will ensure that a carrier will be further motivated to build out its own system. Moreover, once a licensee is fully operational, we believe that the public interest would best be served by allowing the two authorized licensees in each market to compete without requiring that they provide resale capacity to each other. This change in our resale policy can reduce opportunities for collusion and promote interbrand competition.

18. The Commission stated in *Cellular Systems*, 86 FCC 2d at 502-503, that its policies for cellular service were designed to establish a nationwide availability of service to ensure that cellular operators could rapidly expand their system capacity as demand warrants. These remain our goals for cellular service. At the time we initially adopted our cellular rules, we were unsure whether nationwide cellular service would, in fact, be available. However, we believe that our proposed rule section 22.914 (see Appendix B), which would allow a facilities-based cellular carrier to apply resale restrictions to its fully operational facilities-based competitor, promotes these goals by encouraging carriers to build out their systems.[22] A carrier given one of the two facilities authorizations for a market effectively prevents anyone else from making direct use of those frequencies. Failure to fully use those frequencies to serve the public and instead relying on a competitor's facilities should not be encouraged or protected. We seek detailed responses with respect to the analysis in this Notice and our proposed rule.

19. Furthermore, we do not believe that a rule allowing a carrier to deny resale capacity to a fully operational facilities-based competitor would violate the just and reasonable standard of Section 201(b) or that it would be found unjustly discriminatory under Section 202(a). *See supra* notes 8,9. Because restrictions on resale are facially discriminatory, the burden of proving that restrictions are just and reasonable rests on the parties seeking to uphold, retain or impose those restrictions. *See Resale and Shared Use Decision*, 60 FCC 2d at 284-285.

20. In the *Resale and Shared Use Decision*, the Commission stated that, in determining whether resale restrictions are just and reasonable under Section 201(b), we must weigh any adverse impact on the public against the countervailing benefits to the public. *Id.* at 281-83. *See also Hush-a-Phone Corp. v. U.S.*, 238 F.2d 266 (D.C. Cir. 1956). Applying this test, we tentatively conclude that the commenters arguing that a facilities-based cellular carrier should be allowed to refuse resale capacity to its fully operational facilities-based competitor in the same market have demonstrated that clear public benefits exist for permitting the proposed, limited resale restriction and that an adverse impact could result from a requirement that a facilities-based carriers must provide unrestricted resale capacity to its facilities-based competitor.

21. The foundation of the cellular industry's duopoly market structure relies on full facilities-based competition between two carriers who possess relatively equal market power in the service area. Having developed rules and policies to protect and stimulate the duopoly market structure, we believe that it is in the public interest to increase competition between the two licensed cellular carriers in each service area. Furthermore, we agree with the DOJ that resale restrictions with respect to a fully operational competitor should not harm competition. As the DOJ noted, once both facilities-based carriers in a service area are fully operational, neither carrier has the ability to exclude its facilities-based competitor from the cellular market. To the contrary, a cooperative venture between the only two facilities-based carriers for the resale of each other's cellular service might create the potential for collusion in the areas to be served by the two carriers.[23] We agree with the DOJ that such collusion would be detrimental to the public interest. Adopting the proposed limited exception to the cellular resale policy can also promote efficient allocation of spectrum resources and promote interbrand competition. Accordingly, we tentatively conclude that the parties supporting resale restrictions with respect to fully operational licensed cellular competitors in the same market have demonstrated that such restrictions are just and reasonable under the Section 201(b) standard.

22. We also tentatively conclude that resale restrictions, as applied to a fully operational facilities-based cellular carrier would not violate Section 202(a) of the Act. While we agree with those parties who argue that resale restrictions in general are unreasonably discriminatory, we believe that making a limited exception to the general resale restriction is justified in light of our goal of stimulating

interbrand competition. Our rules, from the beginning of the cellular service, have provided both facilities-based licensees with comparable radio spectrum and service areas and, thus, neither licensed carrier is denied access to the market. In addition, fully operational facilities-based cellular carriers are readily distinguishable from other cellular resellers because only those carriers that are Commission licensees can bring into use spectrum that is allocated for cellular service. Competition in the resale market depends on cellular licensees' construction of radio facilities. We therefore tentatively conclude that resale restrictions, as applied to a fully operational facilities-based cellular carrier, would not constitute unjust and unreasonable discrimination in violation of Section 202(a) of the Act.

23. In making this proposal, we are mindful that when the Commission applied its policy prohibiting all restrictions on resale to the cellular industry, the industry was in its earliest stages of development, and no record existed as to how the industry would evolve. However, the cellular industry has developed into a unique telecommunications industry. In the cellular industry two facilities-based carriers are authorized for each market, thus providing the potential for each facilities-based carrier to possess relatively equal market power in their service areas. The cellular industry is also unique in that both facilities-based carriers which have been authorized to provide service in each market have been granted a five-year period during which the systems may be expanded within the MSAs and RSAs, free from the filing of competing applications. As we have indicated in the past, the public interest is served by allowing a cellular system operator the flexibility necessary to modify its system in response to changing demand and other market forces. *See Cellular Systems*, 86 FCC 2d at 509. However, given that the Commission's policy prohibiting resale restrictions was aimed at, among other things, encouraging entry and promoting competition in the marketplace, requiring unrestricted competitor resale may actually hinder competition between the two facilities-based carriers in each market because its creates the potential for the two carriers to engage in collusion. Allowing unrestricted competitor resale may also dissuade facilities-based carriers from fully building out their systems.

B. Petition to Expand Rule Making to Review Cellular Resale Practices

1. Comments

24. On December 6, 1988, the National Cellular Resellers Association (NCRA) filed a petition to expand the Rule Making proceeding to review the resale practices of facilities-based carriers in the cellular industry. In its petition, NCRA also proposes that the Commission adopt new regulatory measures applicable to the cellular industry in order to enhance competition. NCRA contends that Commission oversight of the cellular industry is necessary because the facilities-based carriers have engaged in anticompetitive practices which have nullified the safeguards adopted by the Commission to promote competition and protect the public interest.

25. NCRA first argues that the regulatory measures which it has proposed are justified because the Commission's policy to allocate spectrum to two carriers per market[24] has not promoted competition in the cellular industry. According to NCRA, the anticompetitive practices of the two licensed carriers in each market allow them to operate as a "shared monopoly"[25] where both facilities-based carriers are able to coordinate pricing and other decisions so closely that it appears as if a single entity is setting prices for the cellular service offered by both carriers. In addition, NCRA states that other factors that have allowed facilities-based carriers to dominate the cellular industry as a "shared monopoly" include capacity limitations,[26] lack of state regulations,[27] and demand inelasticity.[28]

26. NCRA charges that price competition exists only during the initial expansion phase when the two carriers are jockeying for market share. NCRA alleges that once the cellular markets mature, the markets are transformed into shared monopolies devoid of price competition.[29] In support, it submits data which compares the rate plans of cellular carriers in 16 markets for a hypothetical customer who has 300 minutes of usage per month (80% peak, 20% off-peak). According to NCRA, the data reveal that in ten of the sixteen markets, the two carriers charge the same amount for at least one rate plan, while in the remaining markets, the charges vary only slightly. NCRA contends that similar pricing practices exist in other markets throughout the nation.[30] Moreover, NCRA charges that when carriers raise their rates, they often do so in tandem with the other carrier in the market.[31] NCRA concludes that this uniformity in pricing reveals that the cellular industry is devoid of competition.

27. NCRA also alleges that cellular carriers are engaging in several practices which violate the Commission's resale policies. First, it contends that cellular carriers are operating their retail arms at a loss, which is then subsidized by their wholesale arms. According to NCRA, cellular carriers offer wholesale cellular service at an inflated non-cost based price while operating their retail arms at a loss. NCRA believes that the carriers are then subsidizing the retail arms by absorbing their losses and, at the same time, still showing a substantial overall profit.[32] NCRA acknowledges that the Commission's resale policy requires only that cellular carriers provide resale capacity to others at wholesale rates that do not discriminate between the carrier's customers and resellers. Nevertheless, it argues that it is "arbitrary and capricious" for the Commission to rely upon non-discriminatory wholesale rates to ensure meaningful resale opportunities unless the carrier's own resale arms are required to operate profitably.[33]

28. NCRA believes that, without reviewing carriers' books of account, wholesale/retail margins are probative evidence of whether or not a carrier is operating its retail arm for profit. According to NCRA, "if margins are so low that even the most efficient reseller is hard-pressed to show any profit at all, the Commission should be suspicious that the carrier's retail arm is also unable to turn a profit."[34] As evidence that carriers fail to operate their retail arms on a for-profit basis, NCRA refers to financial reports that cellular carriers in the State of California are required to submit to the California Public Utility Commission (California PUC).[35] According to NCRA, these reports show that cellular carriers in California are losing money at the retail level and, at the same time, gaining profits at the wholesale level.[36] In addition, NCRA submits rate data for several of the Bell Regional Holding Companies' cellular affiliates which it believes show that cellular carriers set their rates to limit resellers' profits.[37] According to NCRA, this evidence suggests that carriers are deliberately operating their retail operations at a loss

in order to inflate wholesale rates and underprice resale competitors for the purpose of restricting resale opportunities.[38]

29. Second, NCRA alleges that both wireline and nonwireline carriers discriminate against resellers by imposing special terms and conditions on them that are not applicable to other customers with similar usage requirements. For example, according to NCRA, it is a common practice for carriers to impose minimum usage requirements for resellers but not for other customers; exclusivity requirements whereby carriers condition the provision of cellular service for resale upon the reseller's commitment not to resell the service of the competing facilities-based carrier in the market;[39] and separate rate structures applicable only to resellers.

30. Third, NCRA maintains that a primary cause of unprofitability of resellers is the astronomically high commission payments being made by carriers to their agents.[40] It believes that either the high commission payments result in retail losses which are then subsidized by the carriers' wholesale operations or the commissions are being paid directly by the carriers' wholesale operations. In either event, NCRA believes that the Commission should explore the relationship between the high commission payments and the carriers' unwillingness to operate their retail arms for profit.

31. In addition, NCRA alleges that cellular carriers are engaging in bundling activities, contrary to the Commission's policies. NCRA argues that bundling of cellular customer premises equipment (CPE) and service is particularly harmful to competition in the cellular industry because such bundling directly harms the revenues upon which many resellers rely as their only source of profits.[41]

32. NCRA submits that the Commission must take immediate action in order to correct the alleged abuses cited above. In this regard, NCRA proposes that the Commission issue a notice of proposed Rule Making that takes the following measures. First, NCRA suggests that the Commission conduct an intensive factual investigation into the "monopoly practices and conditions in the cellular industry . . . as well as the current status of cellular regulations."[42] Second, the Commission should reaffirm its resale policy, making clear that all resale restrictions, including exclusivity agreements, as well as discriminatory conditions and rate structures that are applied only to resellers, are unlawful. Third, NCRA proposes that cellular carriers be subject to federally mandated accounting separation rules requiring them to operate their resale and wholesale operations for profit[43] and that they be required to maintain rate cards for wholesale and retail rates in those states where there are no tariff requirements.[44] Finally, NCRA proposes that the Commission impose minimum rate-of-return regulations on carrier's wholesale operations to ensure that carriers do not subsidize their retail operations.[45]

33. Most commenters, except for TRAC, the HCTC Agents,[46] Cellular One of Panama City, Florida Limited (Cellular One) and Amcell, are opposed to NCRA's request to expand the Rule Making proceeding.[47] They argue that NCRA's comments are procedurally outside the scope of the narrow questions raised in the Public Notice inviting parties to file comments in the CTC/NYNEX matter[48] and consideration of the issues raised in the NCRA petition would only complicate and delay the resolution of the issue raised in the *CTC/NYNEX* proceeding. Therefore, they request that the Commission treat the NCRA petition as a petition for Rule Making and, as such, deal with it in a separate proceeding.[49]

34. The parties opposed to NCRA's petition believe that NCRA's allegations are conclusory and unsupported. In this regard, NewVector maintains that NCRA has raised isolated allegations which do not apply to at least 95 per cent of the cellular markets, where there is not enough demand to support a viable resale industry.[50] In this regard, NewVector points out that although it maintains a 25 percent margin between its wholesale and retail rates, it has received few inquiries from resellers to resell its service.[51]

35. With respect to NCRA's contention that the two facilities-based carriers in each market are engaged in a "shared monopoly," Ameritech and others assert that NCRA has presented no evidence to this effect. They maintain that one may not infer collusion merely from the presence of only two cellular licensees in each market. In any event, McCaw, NYNEX, and Ameritech assert that the cellular industry is extremely competitive, with licensees in each market vying for technical superiority, such as experimenting with digital technology, adding new cells to their systems, increasing transmission power, and expanding coverage areas. Furthermore, McCaw asserts that its experience in numerous markets shows that cellular operators are competing with regard to price and that the full cost of cellular service has declined in the past few years.[52]

36. In addition, NYNEX and others rebut NCRA's claim that cellular carriers do not compete with alternative mobile service providers. They assert that, to the contrary, they compete with all providers of radio telephone service including paging, traditional two-way mobile, and dispatch services, and that this competition serves as a check against cellular market power.[53]

37. Furthermore, the parties opposed to NCRA's petition reject NCRA's request for federal regulatory oversight of the cellular industry. With regard to NCRA's claim that market congestion is contributing to the alleged lack of competition in the cellular industry, BellSouth asserts that the relationship between price and the scarcity of radio spectrum resources would be the same regardless of the number of service providers in each market.[54] Concerning NCRA's objections to the high commissions that facilities-based carriers are paying their agents to sign up new subscribers, McCaw points out that this issue has little to do with the Commission's resale doctrine since such commissions are not a regulatory restriction on resale.[55] In any event, high commissions, McCaw and others assert, are evidence of a competitive industry where substantial commission rates reflect the high marketing expenses that are necessary at this stage of cellular development to encourage independent agents to invest time and money in promoting a new technology.[56] With respect to NCRA's argument that the demand for cellular service is inelastic, several of the parties point out that NCRA has presented no evidence, such as economic or statistical data, to support this position.[57]

38. The parties opposed to NCRA's petition deny that facilities-based carriers operate their retail arms at a loss and then subsidize the losses from the carriers' wholesale profits. BellSouth points out that resellers generate wholesale revenue for the facilities-based carrier. As such, BellSouth argues that if facilities-based carriers intended to lose money on the retail side, it would be illogical for

them to drive resellers, who are wholesale customers, out of business.[58] Other commenters point out that NCRA's comments in this regard do not reflect actual marketplace conditions.[59]

39. Furthermore, the parties opposed to NCRA's petition to expand the Rule Making proceeding reject NCRA's regulatory proposals for the cellular industry. As for NCRA's proposal that the Commission mandate separate wholesale and retail rates and require the retail arms to operate on a for-profit basis, NYNEX and others argue that NCRA has provided no evidence to prove that facilities-based carriers are circumventing the Commission's resale policy by intentionally operating their retail affiliates at a loss. Moreover, NewVector asserts that NCRA does not take into account the huge capital investments that the carriers have made in building their systems. For these reasons, NewVector believes that facilities-based carriers should be allowed to set their wholesale rates at a level which allows them to recover their investments. In this regard, it points out that the majority of facilities-based carriers are not showing a consistent positive cash flow, even when the revenues of wholesale and retail operations are combined.[60] Furthermore, CTIA, Ameritech and McCaw point out that the Commission's current rules do not require separate wholesale/retail rates. They maintain that if such rules were implemented, they would result in higher cellular service rates for both wholesale and retail customers, and ultimately for the public. In any event, Ameritech maintains that the states have jurisdiction with respect to charges, classifications, practices and services in connection with cellular services offered by licensed carriers. Therefore, they argue that resellers' complaints with respect to cellular rates should be brought before the states and not before the Commission.[61]

40. As to NCRA's request that the Commission require carriers to make available to the public rate cards for wholesale and retail rates, CTIA points out that the Commission has refused to impose these type of regulations on the cellular industry in the past, finding such regulations unjustified. Ameritech argues that NCRA's proposal to require licensees to make available rate cards listing their prices for cellular service makes it easier for parties to collude on prices.[62]

41. With respect to NCRA's request that rate-of-return regulations be imposed, Ameritech, McCaw, and CTIA cite *New York SMSA Limited Partnership* [63] for the proposition that, in the past, the Commission has refused to dictate a particular wholesale/retail margin and has never guaranteed that resellers would make a profit. Rather, the Commission has only required that resale capacity be provided to resellers on a nondiscriminatory basis and on the same terms and conditions as to the carrier's own distribution arm and customers. CTIA maintains that NCRA's concern in this regard is with the decision of some states not to regulate cellular service. CTIA believes that these state decisions should be left alone to the extent that such decisions do not impede federal policies.[64] In any event, CTIA asserts that NCRA's complaint reveals nothing but efficient pricing in the cellular industry.

42. In response to NCRA's complaint that resellers have been required to comply with allegedly discriminatory onerous term and conditions, McCaw states that the continued availability of efficient, affordable cellular service is directly dependent upon the ability of facilities-based carriers to negotiate reasonable volume guarantees and creditworthiness safeguards with resellers. Citing *New York SMSA Limited Partnership, supra*, McCaw points out that the Commission has expressely permitted facilities-based carriers to use minimum number block size requirements and minimum time commitments when dealing with resellers.

43. In short, the parties opposed to the NCRA petition recommend that the Commission should reject the petition because its desired aim is to benefit non-facilities-based resellers only at the expense of the public. These parties emphasize that the Commission's cellular resale policies were never intended to protect resellers from the rigors of competition.

2. Discussion

44. After having reviewed the entire record before us, we find that the allegations raised in NCRA's petition to expand are insufficient to justify altering our resale policies at the current time. Therefore, NCRA's petition to expand is denied for the reasons given below.[65] We take this opportunity, however, to emphasize that except for the limited exception we have proposed in this Notice regarding competitor resale, the FCC policy prohibiting restrictions on resale continues to apply with full force to the cellular industry. Thus, for example, any volume discounts available to cellular's large "retail" customers must be available on the same terms and conditions to resellers. It also means that resellers must be permitted to resell cellular services under the same terms and conditions offered to retail customers. Our Section 208 complaint process is available to investigate and adjudicate complaints of violations of our cellular resale policy. We also point out that if, in the future, it appears that our cellular resale policy is being widely abused by facilities-based carriers, we will not hesitate to revisit the issues NCRA has raised.

45. We also decline to conduct a broad inquiry into the state of cellular competition and state regulation of cellular. There are several factors which make such a study premature. First, the Commission began authorizing cellular service only seven years ago. Even in the largest cities, carriers have only recently completed building their systems, incurring substantial capital costs. Most rural areas still do not have service. Second, carriers, at least in the larger cities, will be converting to digital technology over the next two to three years at significant expense. Although it is unclear how long this conversion will take, how much it will cost, and how smooth it will be for either the industry or consumers, this digital conversion should substantially alleviate current capacity constraints in the largest cities.[66] Third, we recently adopted a Notice of Inquiry exploring whether the Commission should allocate spectrum for advance personal communications services, a decision which could affect competition in the cellular industry. *See Amendment of the Rules to Establish New Personal Communications Services, Notice of Inquiry*, Gen. Docket No. 90-314, FCC 90-232 (adopted June 14, 1990).

46. All of these factors -- current huge capital costs, relief for capacity constraints and future competition -- may so radically alter industry practices that a study at the present time would not be useful. Rather, it would be wiser to monitor the course of events prior to taking action which may later prove unnecessary.

47. We wish to emphasize that we share NCRA's concern for promoting competition in the cellular industry[67], and that we have carefully examined the evidence that NCRA has submitted in its petition. We nevertheless conclude, for the reasons given below, that NCRA has not presented sufficient evidence to override the factors that we believe justify a conclusion that the broad inquiry NCRA proposes would not be appropriate at this time.

48. First, there is not sufficient evidence at this time to demonstrate that facilities-based carriers throughout the cellular industry are engaging in anticompetitive activities that result in a lack of price competition. We find that NCRA's selective comparisons of prices for service to a hypothetical customer do not necessarily show that price competition does not exist throughout the cellular industry. Similarly, we find information such as unverified statements in investment analyst's reports and magazine articles to be insufficient to support a conclusion that a Commission study is warranted at this time. Finally, articles in newspapers and trade publications referring to alleged instances where the licensed carriers in two separate markets raised their prices at the same time does not demonstrate a pattern of conduct throughout the industry. Even though the selected prices for cellular service in the markets which NCRA identifies are similar, that evidence alone is insufficient for us to conclude that facilities-based carriers have engaged in anticompetitive pricing practices even in those markets. To the contrary, a similarity in prices for cellular service, without more, may equally indicate vigorous price competition between facilities-based carriers in the same market.[68] Accordingly, we find that there is insufficient evidence to justify a Commission study at this time into the allegation that facilities-based carriers have engaged in unjustified concerted action, such as exchanging price information, that has had an effect on the price of cellular service. *See, e.g., United States v. Container Corporation of America*, 383 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969). Notwithstanding, we do remain committed to ensuring that competition exists, and we will take whatever action is required in the future to fulfill that goal.

49. We also cannot conclude that the demand for cellular service is inelastic at this stage in cellular's development. No one has submitted any evidence, such as economic statistical data, to support this position. Moreover, one of the sources that NCRA cites to support its argument that the demand for cellular service is inelastic in fact characterized cellular demand as elastic, thus undercutting this argument.[69]

50. NCRA's concern that there is lack of state regulation is not sufficient, in our judgment, to justify federal intervention. States have the authority to regulate intrastate cellular service rates. It is noteworthy that they have not found it necessary to impose rate-of-return regulation (or in many cases, any regulation) on cellular service providers. Also, no evidence has been presented to show that cellular systems that are operated in states where no cellular telephone regulations exist engage in anticompetitive activities or charge higher prices than in the states which regulate cellular service. In view of these facts, we are unwilling to approve federal intervention that may well be unneeded.

51. Finally, there is insufficient evidence that facilities-based carriers are operating the retail arm of their operations at a loss which is, in turn, subsidized by their wholesale arms, with the specific intent to drive resellers out of business. In support of its argument, NCRA refers to the financial reports submitted to the California PUC which suggest that cellular carriers in the State of California operate their retail operations at a loss while, at the same time, their wholesale operations are showing a profit. Even if we were to accept NCRA's argument that the financial data submitted to the California PUC reveals that cellular carriers within the State of California are operating their retail arms on a not-for-profit basis, this evidence would be insufficient to reveal an industry-wide pattern of conduct to justify a revision of our rules. Similarly, we do not believe that the wholesale/retail rate data which NCRA submitted for several Regional Holding Companies are sufficient to demonstrate that cellular carriers are intentionally operating their retail arms at a loss. Furthermore, NCRA has submitted no evidence to show that resellers are operating unprofitably and are being driven out of business.

52. In light of this discussion, except for the changes proposed in this Notice, we decline to alter the Commission's cellular resale policies. We are not pursuaded that it would be wise policy at this time to consider the need for separate accounting for wholesale/retail operations, regulate wholesale rates of return or require that rate cards be filed with the Commission.

53. NCRA's regulatory proposals may also be counterproductive. Filing rate information with the Commission could conceivably be anticompetitive in that it would provide competitors advance notice of price changes. In addition, engaging in traditional rate of return regulation of wholesale prices could conceivably hinder price competition, particularly if carriers' costs vary substantially. Forcing rate of return regulation on this emerging industry could lead to pricing distortion, including possible higher prices, and circumvent competition-driven investment. In the absence of clearly demonstrated harm to consumers, we believe the better course would be to maintain current resale policies pending future developments in cellular capacity improvements and future competition from new service technologies.

54. With regard to NCRA's argument that facilities-based carriers are discriminating against resellers by imposing special terms and conditions on them that are not applicable to other customers, the Commission's cellular resale policy requires that facilities-based cellular carriers not place restrictions on resale of any of the services offered to the public. Cellular carriers must permit resellers to take service on the same terms and conditions as any other cellular customer would take service.[70] Thus, for example, requirements that resellers make deposits, meet minimum number limitations and the like, which are not also imposed on other customers, appear discriminatory and, thus, would violate the Commission's resale policy unless justified as reasonable.[71] Likewise, a facilities-based carrier's requirement that a reseller not resell the services of a competitor also violates the resale policy.[72] Similarly, with respect to resellers' concern that facilities-based carriers are offering their preferred customers bulk rates that are lower than wholesale rates, while at the same time not making these bulk rates available to resellers, such a practice appears discriminatory. Under our resale policy, facilities-based carriers offering a bulk rate to certain customers must make the bulk rate available to resellers on a non-discriminatory basis and on the same terms and conditions as made

available to other similarly-situated customers.[73] The reasonableness of any particular restriction must, of course, be assessed on a case-by-case basis.

55. We should also note that the Commission has never required cellular companies to establish separate wholesale and retail operations. In the same vein, the Commission's resale policy does not require that carriers charge separate wholesale rates.[74] We observe that some carriers have established wholesale rates, and we do not discourage such pricing. We only require that, at a minimum, no restrictions on resale be imposed.[75]

56. NCRA also argues that cellular carriers' payments of commissions to agents for adding additional customers to the carriers' system harms resellers, who do not receive commissions from facilities-based carriers. NCRA does not argue that the commission payments should be prohibited, but does claim that some payment rates are too high. These commission payments are marketing expenses, no different in purpose than a company hiring salaried employees to market products. As such, they are legitimate expenses which a cellular carrier is free to recover in its prices. In these circumstances, there is no need to investigate the payment of sales commissions to agents.

57. As we previously indicated, we have never guaranteed that any reseller would make a profit. *See, e.g., New York SMSA Limited Partnership*, 58 Rad. Reg. 2d (P&F) 525 (1985); *Miami CGSA, Inc.*, Mimeo No. 4507 (1984). A reseller is only guaranteed an opportunity to resell the cellular service of all facilities-based carriers on the same terms and conditions that the carriers provide to their own customers. Profitability for the reseller as well as for the carrier will be based on the ability to operate successfully in a competitive environment.

58. Accordingly, based on the record before us and the reasons stated above, we strongly reaffirm the current cellular resale policy and decline to initiate a Rule Making to alter this policy except for the limited exception to the resale requirement that we have proposed in this Notice.

IV. REGULATORY FLEXIBILITY-INITIAL ANALYSIS

59. *Reason for Action.* We are proposing to adopt rules for the provision of resale capacity which encourage facilities-based cellular carriers to fully build out their systems as demand warrants.

60. *Objective.* The purpose of this Rule Making is to provide effective and adaptive regulation for communications, while eliminating regulations which are unnecessary or inimical to the public interest.

61. *Legal Basis.* Authority for this notice is contained in Section 1, 4(i), 4(j) and 303(r) of the Communications Act of 1934, 47 U.S.C. Section 151, 154 (i), 154(j) and 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553.

62. *Description, potential impact and number of small entities affected.* None.

63. *Federal rules which overlap, duplicate or conflict with these rules.* None.

64. *Significant alternatives minimizing impact on small entities and consistent with stated objectives.* None.

65. *Reporting, record keeping, and compliance requirements.* None.

V. PAPERWORK REDUCTION ACT OF 1980

66. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found not to impose new or modified information collection requirements on the public.

VI. EX PARTE PRESENTATIONS

67. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

68. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

69. Any person who in making an oral ex parte presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation, Section 1.1206.

70. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **May 20, 1991,** and reply comments on or before **June 4, 1991.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed.

Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

VII. ORDERING CLAUSES

71. Accordingly, IT IS ORDERED, that the petitions for Rule Making filed by Cellular Telephone Company and the United States Department of Justice ARE GRANTED.

72. IT IS FURTHER ORDERED, that the petition to expand the Rule Making proceeding filed by the National Cellular Resellers Association IS DENIED.

73. IT IS FURTHER ORDERED, pursuant to Sections 1,4(i), 4(j) and 303(r) of the Communications Act of 1934, 47 U.S.C. Sections 151, 154(i), 154(j) and 303(r) that there is ISSUED A NOTICE OF PROPOSED RULE MAKING.

74. IT IS FURTHER ORDERED, that the Secretary shall cause a copy of this Notice to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (5 U.S.C. Section 603(a)).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Commenting Parties

ALLTEL Mobile Communications, Inc. (ALLTEL)
Bell Atlantic Mobile Systems, Inc. (Bell Atlantic)
BellSouth Corporation (BellSouth)
Cellular Marketing, Inc., Lawrence Communications, Inc., Mobius Electronics, and W. Roy Bronson (collectively the HCTC Agents)
Cellular Telephone Company
Centel Cellular Company (Centel)
Competitive Telecommunications Association (CompTel)
Contel Cellular, Inc. (Contel)
GTE Mobilnet Service Corporation (GTE)
McCaw Cellular Communications, Inc. (McCaw)
Metromedia Paging Services, Inc. (Metromedia)
National Cellular Resellers Association (NCRA)
New York State Department of Public Service
North American Telecommunications Association (NATA)
NYNEX Mobile Communications Company (NYNEX)
PacTel Cellular (PacTel)
Telocator
TRAC Communications, Inc. (TRAC)
U S West NewVector Group, Inc. (NewVector)
Vanguard Cellular Systems, Inc. (Vanguard)

Reply Comments

ALLTEL Mobile Communications Inc.
Ameritech Mobile Communications, Inc. (Ameritech)
American Cellular Network Corp. (Amcell)
Bell Atlantic Mobile Systems, Inc.
BellSouth Corporation
Cellular One of Panama City, Florida, Limited (Cellular One)
Cellular Telecommunications Industry Association
Competitive Telecommunications Association
Contel Cellular, Inc.
GTE Mobilnet Service Corporation
HCTC Agents
McCaw Cellular Communications, Inc.
National Association of Cellular Agents (NACA)
NYNEX Mobile Communications Company (NYNEX)
PacTel Cellular
Telocator
U S West NewVector Group, Inc.

APPENDIX B

PROPOSED RULES

Title 47, Part 22 of the Code of Federal Regulations is proposed to be amended as follows:

Part 22 PUBLIC MOBILE SERVICE

1. The authority citation for Part 22 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1083, as amended; 47 U.S.C. 154, 303.

2. Section 22.914 is amended by revising the section heading, redesignating the existing text as paragraph (b) and adding new paragraph (a) to read as follows:

Section 22.914 Provision of resale capacity and cellular service to subscribers.

(a) A cellular system licensee shall permit unrestricted resale of its service, except that the licensee may apply resale restrictions to the other licensee authorized to provide cellular service in the same market after the five year fill-in period (see § 22.31(f) and 22.31(g)) for the licensee requesting resale has expired.

(b) Subscriptions to mobile service shall be afforded to the public within the licensee's Cellular Geographic Service Area in chronological order of filing of request for service, except under emergency conditions. Prospective subscribers shall be informed of the area in which reliable service can be expected. If a licensee turns away a request for

service due to lack of capacity it shall report that fact to the Commission and indicate how it plans to remedy its lack of capacity.

FOOTNOTES

[1] Resale is defined as an "activity wherein one entity subscribes to the communication services and facilities of another entity and then reoffers communications service to the public (with or without 'adding value') for profit." *See Resale and Shared Use Decision*, 60 FCC 2d at 271.

[2] Section 201(b) of the Act provides that:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful . . . .

[3] Section 202(a) makes it unlawful:

> for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . .

[4] *Resale and Shared Use Decision*, 60 FCC 2d at 283-84, 321.

[5] *Resale of Switched Services*, 83 FCC 2d at 172.

[6] Title III of the Act, 47 U.S.C. Sections 301 *et seq.*, governs the licensing of all communications services which operate through the use of radio frequencies.

[7] 86 FCC 2d at 511.

[8] Letter from Deputy Chief, Mobile Services Division (MSD) to Ben C. Fisher, Esquire (April 17, 1988).

[9] NYNEX-R is a wholly-owned subsidiary of NYNEX Communications Corporation (NYNEX), which in turn is the managing partner of the New York SMSA Limited Partnership, the wireline licensee in that market.

[10] Citing *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 54-57 (1977), the DOJ argues that the Supreme Court has recognized that vertical restrictions, such as restrictions imposed by a firm on its distributors, may promote competition by furthering interbrand competition even though they may restrict intrabrand competition. DOJ Response at p.9. Interbrand competition is the competition among manufacturers of the same generic product; in this case interbrand competition occurs between the two facilities-based carriers in each market. In contrast, intrabrand competition is the competition between competing distributers of the same brand of product or service.

[11] In this regard, the DOJ maintains that the burden of proof should be on the party that requests the Commission to alter the carrier's business judgment to demonstrate that regulatory intervention is necessary. DOJ Response at 7.

[12] *Cellular Telephone Company*, 3 FCC Rcd 6274 (1988).

[13] In Public Notice, DA 88-1578 (released October 7, 1988), all interested parties were invited to file comments concerning the extent to which the Commission should continue to apply its resale policy. Comments were due December 7, 1988, with reply comments due January 6, 1989. In addition, *ex parte* comments were filed by 13 parties and, in accordance with Section 1.1206 of our Rules, have been made part of the record in this proceeding.

[14] *See* Appendix A for listing of all commenters. For many parties, a short name is given in parentheses. Throughout this *Order*, we shall use these short names in referring to the comments and reply comments.

[15] When the Commission established the wireline frequency set aside and filing requirements, it indicated that there was a possibility that wireline carriers would have an unfair "headstart" over nonwireline carriers in the introduction of service to the public. Most parties believe that the resale requirement played an important role in mitigating the advantage that some carriers enjoyed prior to the construction of their competitor's system in the Metropolitan Statistical Areas (MSA) and that the resale policy will play an equally important role in mitigating similar advantages in the Rural Service Areas (RSA). *See e.g.*, Centel Comments at 4; Contel Comments at 12; Pactel Comments at 5; and Vanguard Comments at 3.

[16] In order to preserve the resale requirement with respect to facilities-based carriers during the "headstart" period, Contel suggests that the "headstart" period should be extended 90 days following start up of the second system to allow sufficient time for resale customers to be switched from one system to another. Contel Comments at 12.

[17] McCaw and Contel argue that when the Commission adopted its cellular resale policy, it never determined whether the resale policy, as applied in the interexchange market, makes sense in cellular's duopoly market structure. They argue that the Commission should make this assessment for the first time in this proceeding. McCaw Comments at 5-6; Contel Comments at 6-7.

[18] Contel Reply Comments at 7.

[19] NYNEX Comments at 7-8.

[20] *Id.* at 9; BellSouth Comments at 3.

[21] This five year period is referred to as the fill-in period. Applications filed during this period by licensee or permitees to serve unserved areas within the MSA or RSA but outside the Cellular Geographic Service Area (CGSA), are referred to as fill-in applications. Sections 22.31(a)(1) and (f) state that applications for unserved areas within the MSA or RSA are not allowed to be filed by anyone, except the licensee or permitee, for a period of five years from the date of grant of the original construction authorization for each system. *See Rules for Rural Cellular Service (Second Report and Order)*, 2 FCC Rcd 2306 (1987); *Fifth Report and Order*, 3 FCC Rcd 6401 (1988).

[22] In this regard, we remind all licensees that those who fail to build out their systems within their five-year fill-in periods will be required to file unserved area applications, in competition with other applicants, to expand their systems within their designated service areas.

[23] DOJ Response at 10-11.

[24] In *Cellular Systems*, 86 FCC 2d at 474-82, the Commission authorized two carriers to provide cellular service in each market. In so doing, it concluded that even a "marginal amount of facilities-based competition into the cellular market will foster public benefits of diversity of technology, service and price." *Id.* at 478.

[25] The term "shared monopoly" was coined as a legal term by Professors Turner and Areeda. *See* III P. Areeda & D. Turner, *Antitrust Law*, para. 840, at 359-71 (1978). While NCRA acknowledges that a "shared monopoly" is not an accepted legal theory for subjecting certain oligopolists to the anti-monopoly prohibitions of Section 2 of the Sherman Act, 15 U.S.C. Section 2, it believes that the term accurately describes, from an economic perspective, how the two cellular carriers in each market operate.

[26] According to NCRA, the growing popularity of cellular service has resulted in numerous mature systems being close to reaching full capacity. NCRA believes that the increasing cellular spectrum congestion caused by such growth serves only to reinforce the carriers' economic incentives and opportunity to operate as a shared monopoly to maximize profits. NCRA Petition at 17.

[27] NCRA asserts that, except for New York and California, states have declined to regulate cellular carrier rates and practices. This absense of federal and state regulatory oversight, NCRA argues, allows the two licensed carriers in each market to engage in monopolistic practices, such as non-cost based pricing, cross-subsidization and other predatory behavior. NCRA Petition at 20.

[28] NCRA maintains that cellular carriers do not face significant competition from landline telephone companies which could restrain the carriers' ability to engage in monopoly pricing, citing *Cellular Systems*, at 484 and *United States v. Western Electric Co.*, 673 F. Supp. 525, 550-52 (D. D. C. 1987). Furthermore, it asserts that since cellular telephones were first introduced in the early 1980's, cellular telephones have become a business necessity for many users. NCRA argues that as subscribers become increasingly dependent upon cellular telephones and demand becomes increasingly inelastic, carriers have greater leeway to price cellular service at monopoly levels.

[29] NCRA refers to remarks by industry analysts, commenters, and authors who state that cellular operators are competing on the basis of services and features rather than on the basis of price.

[30] NCRA submits a rate chart from an article on cellular service which it believes shows substantial uniformity in business rates in a large number of major cellular markets. *See* Schiffres, *Choosing A Phone For Your Car*, Changing Times, December, 1988, at 96.

[31] NCRA refers to articles in *The Detroit News* and *Mobile Phone News*, which report that the two licensed carriers in the Detroit, Michigan and Santa Cruz, California MSA markets raised or sought to raise their rates at the same time.

[32] NCRA provides the hypothetical example of where a carrier offers wholesale cellular service for the non-cost based rate of $100 to its retail arm and to resellers. The retail arm then marks down that same cellular service to $90 when offering it to the public, thus incurring an up-front loss of $10, which the carrier's wholesale arm absorbs directly or indirectly. NCRA states that the carrier is able to absorb the retail losses and still make a substantial profit because the $100 was not cost based to begin with. By contrast, NCRA maintains that the reseller must mark up the cellular service in order to cover its costs and show a profit. Hence, the resellers are unable to compete with the retail arm of the cellular carriers.

[33] NCRA Petition at 28-30.

[34] *Id.* at 32.

[35] NCRA points out that in the California PUC Commission Case No. 86-12-023, the Cellular Resellers Association, Inc. (CRAI), a California non-profit corporation comprised of independent resellers certified by the California PUC, filed a complaint with the California PUC, alleging that cellular carrier's retail operations in California were being operated on a "for-loss basis." At the time the complaint was filed, the California PUC required cellular carriers to separate their wholesale and retail operations through cost allocation procedures and to file periodic reports with the California PUC.

[36] For example, according to the exhibits submitted by NCRA, the financial data for 1987 shows that the retail operation of one cellular carrier lost approximately $8.7 million, yet the same carrier earned $14.3 million in profit for the year. NCRA Petition at 31-32.

[37] The rate data submitted by NCRA show monthly wholesale and retail rates of Ameritech (in Chicago), PacTel, Bell Atlantic and BellSouth for customers with 200 peak minutes of usage. NCRA asserts that the carrier's margins between their wholesale and retail rates (carrier's retail price - carrier's wholesale price/carrier's retail price) from which resellers must attempt to make a profit range from 24% for an 8-telephone number account in Ameritech territory to 22% for a 24-telephone number account in PacTel territory to 13% for a 4-telephone number account in BellSouth territory.

[38] NCRA also alleges that some carriers, particularly those found in states that do not regulate cellular carriers, have taken the extreme approach of eliminating wholesale/retail margins altogether. The only explanation for such rate structures, NCRA contends, is that either the carrier's retail arm is selling cellular service at wholesale cost or the carrier is charging the retail arm a wholesale rate which is less than the wholesale rate charged to resellers. NCRA believes that either possibility raises concerns that justify Commission action.

[39] NCRA believes that the Commission, in the *CTC/NYNEX Order*, implicitly struck down all exclusivity requirements when it held that CTC was required to provide resale capacity to NYNEX-R, which marketed the cellular service of the other carrier in the New York City market. Under the *CTC/NYNEX Order*, NCRA argues, non-facilities based carriers are entitled to resell the services of both carriers in the same market.

[40] Cellular carriers often employ third-party agents to market the carriers' cellular services. In return for signing up customers on behalf of the cellular carrier, the agent is paid a commission, the amount of which varies from market to market.

[41] On December 23, 1988, NCRA filed a petition for declaratory ruling, requesting that the Commission issue a declaratory ruling reaffirming that the Commission's prohibition against the bundling of CPE and service applies to cellular carriers. While the petition reiterates many of the same arguments made in the instant petition, it raises several more complex issues. NCRA also proposes that the Commission enforce the bundling prohibition. The bundling issue is addressed in a separate proceeding. *See Bundling of Cellular Customer Premises Equipment and Cellular Service*, CC Docket No. 91-34, FCC 91-34 Adopted February 13, 1991).

[42] NCRA Petition at 53.

[43] According to NCRA, such standards could be incorporated into capitalization plans, subject to Commission approval. In addition, each carrier would be subject to an annual Commission audit, at the carrier's own expense.

[44] NCRA also recommends that we require carriers to keep and make available all agreements where the terms vary from the terms listed in the rate cards.

[45] NCRA states that the Commission should not impose traditional rate-of-return regulations but instead that the Commission should impose some rate-of-return ceiling, such as 12.75%, upon carriers' wholesale operations.

[46] The HCTC Agents, in their comments, allege that the Houston Cellular Telephone Company (HCTC), the non-wireline licensee for the Houston, Texas MSA market has engaged in the following anticompetitive practices: 1) imposing near-unilateral contracts on HCTC agents, causing them to work exclusively for HCTC, and then failing to honor those contracts; 2) entering into sole distribution contracts with parts

and equipment manufacturers and then pricing such equipment in a discriminatory manner; 3) creating billing problems for HCTC Agents and interfering with HCTC Agents' contractual agreements with subscribers; 4) engaging in predatory conduct, such as CPE and service bundling; 5) engaging in price collusion with the Houston wireline carrier; and 6) refusing to permit agents to become resellers. The HCTC Agents acknowledge that their comments are, in fact, a complaint against HCTC but they ask that the Commission take no action against HCTC in this proceeding. Rather, they assert that the Houston cellular marketplace is a "microcosm" of the cellular industry as a whole and they request that the Commission utilize the information in their comments to reassess the cellular resale policy. HCTC Agents Comments at 3.

[47] HCTC and TRAC generally concur with all the arguments raised by NCRA in its petition to expand the Rule Making proceeding. Cellular One supports the NCRA petition insofar as it focuses on the alleged practice of cellular carriers to bundle CPE and service. Amcell, on the other hand, takes no position on the merits of the issues raised by NCRA, but believes that in view of the maturity of the cellular industry, it may be an appropriate time for the Commission to review its cellular resale policies and their underlying objectives based on empirical data. For this reason, Amcell believes that the Commission should address the issues raised in NCRA's petition.

[48] *See* note 5, *supra*.

[49] Some parties, such as Telocator, suggest that an informal fact finding proceeding or a notice of inquiry would be a more appropriate method of addressing the issues raised by NCRA. Telocator Reply Comments at 5.

[50] NewVector Reply Comments at 4.

[51] NewVector Reply Comments at 5.

[52] McCaw Reply Comments at 15. In support, McCaw refers to a study made by Herschel Shostek Associates, *Cellular Subscribers and Forecasts*, Quarterly Survey at 52-53 (March 1988) which estimates a decline in carriers' charges for 250 minutes of airtime per month from $150 in 1984 to $125 in 1988.

[53] Ameritech Reply Comments at 13.

[54] BellSouth Reply Comments at 12.

[55] McCaw Reply Comments at 16.

[56] *Id.*; BellSouth Reply Comments at 16.

[57] BellSouth Reply Comments at 14; Ameritech Reply Comments at 13.

[58] BellSouth Reply Comments at 17-18.

[59] For example, NYNEX states that in the New York MSA, where it operates New York SMSA Limited Partnership, the wireline carrier, it charges resellers $15 per month per access number and 38 cents per minute for airtime usage. In turn, New York Cellular Geographic Service Area, Inc., its retail arm in the New York MSA market, offers its customers a number of pricing plans, but most customers subscribe to a plan under which they pay $29 per month for access and 55 cents per minute for airtime usage.

[60] NewVector Reply Comments at 6.

[61] Ameritech Reply at 17.

[62] *Id.* at 24.

[63] 58 Rad. Reg. 2d (P&F) 525, 528 (1985).

[64] CTIA Reply Comments at 12.

[65] The October 7, 1988 Notice stated that the Commission had indicated in the *CTC/NYNEX Order* that it would explore further the issues raised in that proceeding by treating the CTC application for review and the DOJ's comments in support as petitions for Rule Making and invite comments concerning the extent to which the Commission should continue to apply its resale policy. Thus, we believe that NCRA's petition is properly before us in this proceeding to the extent that it raises issues concerning the Commission's cellular resale policy. However, we believe that those comments which request that the Commission use this proceeding to clarify its resale policies in other services, such as paging (Metromedia Comments), and interexchange (CompTel), are outside the scope of this proceeding. Accordingly, those issues will not be considered herein.

[66] NCRA's concerns that many cellular systems could soon reach full capacity may also be alleviated by recent Commission actions. In *Amendment of Parts 2 and 22 of the Commission's Rules*, 2 FCC Rcd 1825 (1986), the FCC allocated 10 MHz of additional spectrum to meet the needs of cellular radio providers. Moreover, in *Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, 3 FCC Rcd 7033 (1988), (hereinafter *Auxiliary Cellular Services Order), recon.*, 5 FCC Rcd 1138 (1990), the Commission adopted new rules which allow cellular licensees the option of utilizing new and innovative technologies in the provision of cellular service. In the *Auxiliary Cellular Services Order*, the Commission stated that the cellular industry will be able to use spectrum more efficiently and provide better service to subscribers through the use of nonconventional equipment. *Id.* at 7034. One main benefit of this flexibility is that it frees cellular carriers to convert to digital technology that holds the promise of greatly increasing system capacity.

[67] We note at the outset that with respect to the current cellular market structure, the duopoly market structure was established in full recognition of the fact that only two carriers to a market was not ideal in terms of promoting competition. *Cellular Communications Systems*, 78 FCC 2d 984, 991 (1980). The Commission established the structure because there was a limited amount of spectrum available and each carrier needed enough frequencies to create efficient and economically viable systems. Nevertheless, the Commission concluded that even a marginal amount of facilities-based competition in the market would foster public benefits of diversity of technology, service and price. *Id.* Resale restrictions were prohibited as a means of policing price discrimination, rectifying potential competitive advantages of the wireline providing service first, and providing some degree of secondary market competition.

[68] *See* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusal to Deal*, 75 Harv. L. Rev. 655, 663-73 (1962).

[69] *See* Shosteck, *Why Cellular Is Taking Off*, Telephone Engineer and Management, Vol.92 N.15, August 1, 1988.

[70] *See Cellular Systems*, 86 FCC 2d at 511. Common carriers are obligated to provide service on the same terms and conditions to similary situated persons on a nondiscriminatory basis. *See National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 999 (1976). *See also Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238, 1255-57 (1982), *aff'd sub nom. Wold Communications v. FCC*, 735 F.2d 1468 (D.C. Cir 1984); *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 3 FCC Rcd 3096, 3097 (1988), *aff'd, Northwestern Indiana Telephone Co., v. FCC*, 872 F.2d 465 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990).

[71] The burden of proving that such restrictions are just and reasonable rests on the carriers seeking to uphold, retain or impose such restrictions. *Resale and Shared Use Decision*, 60 FCC 2d at 284-285.

[72] *Cellular Telephone Company*, 3 FCC Rcd 6274 (1988); *TRAC Communications, Inc. v. Detroit Cellular Tel. Co.*, File No. E-88-77, FCC 90-256 (released July 24, 1990).

[73] *See Cellular Systems*, 86 FCC 2d at 511.

[74] Given this policy, NCRA's request that we require a carrier's wholesale arm to operate for profit is not consistent with the existing resale policy since no wholesale arm need be established at all.

[75] New Vector suggests that the Commission's resale policy would be enhanced by eliminating the separate wholesale/retail requirement, to which it believes the Commission requires all Bell Operating Company (BOC) affiliates to adhere. In *Cellular Systems*, the Commission pointed out that under the resale plan developed at the time by AT&T, "[s]eparate books of account would be maintained between the licensee and retail functions." 86 FCC 2d at 511. However, the Commission never specifically required that AT&T maintain separate wholesale and retail divisions or rates.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Petition for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, RM-6539

I support this item because it reaffirms our policy barring restrictions on resale in the cellular industry. Resale or arbitrage has the potential to drive the rates offered by facilities-based carriers toward cost. Indeed, our elimination of restrictions on resale was the foundation on which long-distance competition was built. There is no reason why resale won't have the same positive effect in the cellular industry.

But for resale to do its job, *all* restrictions on resale must be removed. I'm glad to see that the Commission, in this item, has reaffirmed the principle that any volume discount must be provided to resellers on the same terms and conditions that are offered to "retail" customers. The limited exception to the resale policy that we propose today -- for competitor resale -- can be justified only as a way to provide incentives for the two facilities-based carriers in each market to fully build their systems.

In addition to asking the FCC to reaffirm its cellular resale policy, the National Cellular Resellers Association has asked the Commission to take a number of specific actions to address what NCRA believes to be competitive problems in the cellular industry. The NCRA's allegations do concern me, because this agency has a public interest obligation to promote, as far as possible, the competitive development of the cellular industry.

I nevertheless join my fellow Commissioners in declining the NCRA's request to begin an inquiry into the state of competition in the cellular industry. This industry is undergoing major developments, such as conversion to digital technology, which could change the competitive dynamic of the market. I also conclude that NCRA's other proposals -- such as imposing rate of return limits on wholesale cellular services -- are not likely to prove fruitful.

I want to emphasize that I do take seriously the concerns that NCRA raises, and I will be watching developments in this industry closely. It may well be that an inquiry into the state of competition will be necessary in the not-too-distant future.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-34

In the Matter of

Bundling of Cellular Customer
Premises Equipment and
Cellular Service

NOTICE OF PROPOSED RULE MAKING

Adopted: February 13, 1991; Released: March 27, 1991

By the Commission: Commissioner Duggan issuing a statement.

I. INTRODUCTION

1. By this Notice of Proposed Rule Making we seek comment on whether we should clarify or modify our rule governing bundling of cellular customer premises equipment (CPE) and cellular service. In particular, we seek comment on whether we should specifically allow cellular CPE and cellular service to be offered on a bundled basis, provided that service is also offered separately at a nondiscriminatory price and, if so, under what conditions it should be allowed.

II. BACKGROUND

2. On December 23, 1988, the National Cellular Resellers Association (NCRA) filed a petition for declaratory ruling requesting that the Commission reaffirm that its prohibition against the bundling of cellular customer premises equipment (CPE) and cellular service applies to the practices allegedly being conducted by facilities-based cellular carriers.[1] NCRA alleges that cellular carriers are subsidizing their agents' below-cost CPE offerings to new subscribers on the condition that the new subscribers take cellular service for a minimum term. NCRA argues that this practice is unlawful under the Commission's existing policies, citing *ITT World Communications, Inc. v. TRT Telecommunications Corp.*, 51 Rad. Reg. 2d (P&F) 1386 (1982) (*ITT World*). NCRA maintains that whenever a cellular carrier offers CPE and service as a package on more favorable terms than a subscriber could obtain by purchasing the CPE and service separately from the same carrier, the carrier is engaging in prohibited bundling. It maintains that the unbundling prohibition applies to situations in which a carrier offers a special discount, rebate or other benefit solely to customers who agree to purchase CPE and service from that carrier, and is not limited to the classic antitrust situations. According to NCRA, cellular carriers' packaged deals constitute unlawful bundling because the carriers are "pricing terminal equipment with the intent of providing extra benefits or inducements for regulated service customers." *Id.* at 1390. NCRA maintains that such unlawful bundling practices undermine resellers because no one will purchase CPE separately when the package is cheaper. NCRA also contends that this bundling or packaging violates Section 202(a) of the Act because the carriers' offerings patently discriminate in favor of new customers who receive a discount or rebate.[2]

3. The commenters supporting NCRA's petition, [3] most of whom are resellers, argue that bundling is an anticompetitive practice that is driving resellers out of business. According to these commenters, resellers are unable to match a carrier's bundled offering of below cost CPE and cellular service because the narrow profit margin that they are held to by the carriers makes it impossible for them to pay their sales force high activation commissions, and at the same time, recover their subscriber acquisition costs.

4. Cellular carriers and the cellular industry trade associations are opposed to NCRA's petition. They assert that NCRA's allegations that carriers are engaging in cross-subsidization and other anticompetitive practices are unsubstantiated. While they do not dispute that consumers are being offered packaged deals of cellular CPE and cellular service, they argue that marketing packaged deals is not prohibited bundling because CPE and service are also available separately. In this regard, they maintain that the Commission has recognized that packaged offerings of CPE and transmission service benefit customers provided that the CPE and transmission service are also offered on a stand-alone basis. They assert that packaged offerings of cellular CPE and cellular service are not discriminatory because cellular service is available on an unbundled basis to all customers, including resellers and, assuming that customers take similar service, is priced identically to the service obtained through the packaged offering. In any event, they contend that Section 202(a) of the Communications Act does not apply to price discounts to cellular CPE nor does it apply to the regulation of cellular rates, which are essentially intrastate rates and charges. Furthermore, they assert that *ITT World*, the case cited by NCRA to support its contention that the bundling prohibition applies to the cellular industry, involves the telex industry, an interstate and tariffed transmission service and, as such, is inapplicable to the cellular industry. Finally, they contend that NCRA's petition is a self-serving attempt to protect resellers from the rigors of competition by permitting them to provide competitively priced cellular CPE and cellular service while, at the same time, restricting cellular carriers from providing similar offerings.

5. In the *Second Computer Inquiry* proceeding, the Commission required that common carriers sell or lease CPE separate and apart from the carrier's regulated services, and that new CPE be detariffed.[4] By requiring common carriers to offer unbundled CPE and transmission services, the Commission was concerned that customers have the ability to choose their own CPE and service packages to meet their individual communications needs[5] and that they not be forced to buy unwanted carrier-supplied CPE in order to obtain necessary transmission services. The Commission was also concerned that consumers who did not use carrier-provided CPE could find themselves subsidizing consumers who did use carrier-provided equipment,[6] and that independent CPE vendors would be forced to compete against below-cost, tariffed CPE because part of the CPE costs would be recovered through regulated service rates.

6. Although the Computer II bundling restrictions applied to all carriers, the Commission's primary concern was with monopoly facilities-based carriers. Indeed, the Commission noted that bundling might not be unlawful in all market contexts:

> If the markets for the components of the commodity bundle are workably competitive, bundling may present no major societal problems as long as the consumer is not deceived concerning the content and quality of the bundle. The bundle either survives a market test or it does not, and competing vendors find it in their self-interest to make information available to the consumers making the choice. More specifically, some consumers may believe that bundling reduces the "transaction costs" of determining the individual consumer's optimal commodity bundle, i.e., the seller rather than the consumer performs the search for the optimal commodity combination.

Second Computer Inquiry, 77 FCC 2d at 443, n.52.

7. Subsequently, in authorizing commercial cellular service for the first time in 1981, the Commission stated:

> Under our *Second Computer Inquiry*, new terminal equipment is to be deregulated (i.e., unbundled and detariffed) after March [1], 1982. Because cellular service is a new service for which its mobile equipment has never been tariffed, we will require that it be unbundled and detariffed from the start.[7]

Thereafter, the Commission indicated that the provision of cellular CPE should be left largely to the marketplace.[8] However, it was unclear how the markets for cellular CPE and cellular service would develop and whether or not those markets would be subject to state tariffing.

III. DISCUSSION

8. As discussed below, the cellular market has changed significantly since the cellular bundling policy was adopted. The comments filed on NCRA's petition raise a number of issues regarding the role served by the bundling policy in today's cellular market. In order to develop a complete record whereby we can address these concerns, we will institute this Rule Making proceeding to determine whether the policy should be eliminated, substantially modified, or clarified.[9]

9. When the Commission first authorized the provision of cellular service in 1981, the cellular industry was in its nascency and no record existed to predict how the cellular industry would evolve. However, since the adoption of the policy requiring that cellular CPE and cellular service be unbundled, significant changes have occurred in the cellular industry. In light of these changes, we believe it is appropriate to reevaluate our bundling policies. In doing this, we need to look at the following factors: 1) the competitiveness of the cellular CPE market; 2) the competitiveness of the cellular service market; 3) the status of federal and state regulation of cellular service; 4) whether consumers will be harmed by permitting bundling and; 5) the public interest benefits of permitting bundling. The Notice tentatively concludes that a consideration of all of the factors noted above, and the existence of the antitrust laws, warrant allowing the bundling of cellular CPE and service.

10. First, the cellular CPE market appears to be extremely competitive both locally and nationally. Competition in the cellular CPE market has resulted in the widespread availability of CPE from a multiplicity of vendors offering a wide variety of CPE. There have been rapid changes in technology, and cellular CPE is now available in sizes ranging from small hand-held portable units to larger mobile units and with features such as memory capacity and voice activated microphones.

11. We are particularly interested in obtaining input on what effect any changes in our unbundling requirements might have on competition in the cellular CPE market. Cellular CPE is manufactured nationally and internationally and is sold through a wide diversity of distribution outlets that include national retail outlets. Given current market conditions, it seems unlikely that a carrier would be able to exclude CPE providers, including independent CPE retailers, permanently from the market so that the carrier could raise CPE prices.[10] Nevertheless, we seek information on how cellular CPE is distributed today and on cellular CPE manufacturers, including the number of national and international manufacturers and their market shares.

12. In order to further understand the relationship between the cellular CPE market and the cellular industry, we also seek comment concerning the extent to which facilities-based carriers or their agents have entered into exclusive dealing arrangements with particular CPE manufacturers. If CPE manufacturers and cellular carriers engage in exclusionary conduct in the CPE market, anticompetitive consequences in the CPE market could result.[11] In addition, insofar as bundled offerings of cellular CPE and cellular service require that customers obtain service from a specified carrier for a fixed term, we request comments on whether such minimum service commitments may, depending on the length or terms of the commitment, be anticompetitive,[12] discriminatory[13] or contrary to the public interest. Finally, we request comments on the relative importance of the factors incorporated into our analysis and and on any other factors that we do not specifically address here.

13. A second factor influencing our decision to reexamine the unbundling policy is that the cellular industry has grown considerably and today, within each market, facilities-based carriers compete not only against each other, both directly and through agents, but also with numerous resellers. In the cellular industry, two facilities-based carriers are authorized for each market, thus providing the potential for each facilities-based carrier to possess relatively equal power in the service area.[14] When the Commission permitted the BOCs to offer both cellular service and cellular CPE from the same subsidiary, it indicated that "the competitive structure of the cellular radio-telephone industry adequately protects the public from the dangers of potential anticompetitive abuses arising from the joint provision of cellular service and CPE . . . ."[15] In addition, the two facilities-based carriers and the resale carriers must also compete with other telecommunication services, such as paging and wireline services. Hence, we tentatively conclude that the cellular service market is sufficiently competitive so that

bundling would not adversely affect competition in the cellular CPE market. We request comments on this tentative conclusion.

14. Third, cellular service is largely unregulated at the federal and state levels. While at the federal level cellular service has been detariffed from the start, many states do not have tariffing requirements for cellular service. In states where tariffs are required, it appears that there are no tariffs which require cellular carriers to price service according to rate of return principles. Rather, the states have allowed carriers to employ market-based pricing.[16] The utilization of market-based pricing appears to be based on the view that cellular service is non-essential and that the dynamic nature of the cellular industry requires a regulatory framework that encourages continuing reinvestment. Such regulation also appears to be directed toward enhancing competition rather than focusing on traditional rate of return methods used to regulate monopoly services.[17] Hence, we tentatively conclude that the lack of regulation of the cellular industry reflects the competitiveness of the industry and a decreasing concern that carriers are using largely untariffed cellular service rates to act anticompetitively in the untariffed and unregulated cellular CPE market. Nevertheless, we request comments on the impact of current state regulations on the Commission's bundling policy.

15. Fourth, we tentatively conclude that consumers are not likely to be harmed by permitting bundling. In this regard, it appears unlikely that the elimination of the antibundling rule will affect cellular service prices. Discounted cellular CPE appears to be the result of agents using their commissions to offset the original cost of CPE. If cellular CPE discounts were eliminated, carriers probably would continue to pay their agents commissions because the payment of these commissions appears to be market driven. Moreover, because cellular service prices also appear to be market driven, the elimination of cellular CPE discounts might not cause a decrease in cellular service prices.[18] Hence, although it appears that agents are using carrier provided commissions to enable them to hold down the prices they charge their customers for cellular CPE, we seek comment on whether this is the type of cross-subsidy that public policy should prevent. We also seek comment on whether a modification of the antibundling rule would adversely affect cellular service prices.

16. Fifth, we tentatively conclude that there may be significant public interest benefits associated with bundling of cellular service and CPE. The cellular industry has developed a variety of marketing practices, such as discounting costs to consumers and packaging of cellular CPE and cellular service, which the Commission has never before examined. However, bundling or packaging of cellular CPE and cellular service and discounting practices can benefit consumers by offering them an expanded choice of goods and services at reduced costs. This, in turn, could encourage others to respond by developing innovative marketing practices as well, thus stimulating further competition in the cellular industry. Such competition would ultimately benefit consumers.

17. Given that the Commission has not examined its policy prohibiting the bundling of cellular CPE and cellular service in the context of the existing industry and in light of the potential advantages that may result, we seek comments on the potential public interest benefits of permitting bundling of cellular CPE and cellular service. For instance, the current widespread industry practice of cellular agents offering cellular CPE at substantially reduced prices on the condition that the customer also take cellular service from a particular cellular carrier for a minimum period of time is likely to attract new customers to cellular because of the attractive equipment pricing. The customer is able to obtain less expensive CPE and the cellular carrier has added a new customer that might not have otherwise subscribed to cellular service.[19] Initial cellular investment is relatively high and, because the technology is rapidly changing, cellular carriers must recover the costs of this investment in a relatively short period of time.[20] Therefore, cellular carriers need to load their systems as soon as possible in order to recover that investment. In addition, cellular service is relatively new, and many customers may view cellular services as non-essential. Some market studies have indicated that the cost of purchasing CPE might be a deterrent to many customers who otherwise would be interested in becoming long-term cellular customers. Therefore, there appears to be a marketing need to price CPE at a discount, or even as a loss-leader. Under these circumstances, it may be in the public interest to modify our bundling policy in the cellular context to permit the current industry practice under which agents discount CPE prices on condition that the customer subscribe to a particular carrier's cellular service for a limited time.[21] We also seek comment on whether, if bundling were prohibited, cellular service providers would be likely to employ alternative techniques to attract new customers, such as offering promotional service rates or by otherwise discounting cellular service.

18. In addition, another example where the public and cellular carriers alike might benefit from offering what might be classified as bundled CPE and cellular service may arise when cellular carriers convert their systems to digital. At that time, cellular carriers will have to find some way to encourage a significant percentage of customers to purchase new, higher-priced digital cellular CPE because current capacity constraints on analog systems cannot be relieved if customers do not use digital CPE. One way to accomplish this conversion from analog to digital CPE could be to offer discounted digital CPE in exchange for a commitment to continue taking cellular service from that carrier for a period of time. These types of arrangements are beneficial to the customer and carrier alike by encouraging the use of newer, more spectrum-efficient technology.

19. We note that the justifications for the Commission's original adoption of anti-bundling policies did not focus on any impact of those policies on resellers. Rather, the unbundling requirements were intended to protect ratepayers and to promote competition in the CPE marketplace. We request comment on the extent to which elimination or substantial modification of the cellular CPE unbundling policy will affect resellers and the extent to which this impact should be taken into account in formulating our new policy.

20. In the alternative, we request comment on whether there may be certain limited instances justifying adoption of a substantially modified bundling policy. For instance, cellular carriers which require a customer to purchase or lease CPE as a condition of obtaining cellular service may limit customers' options. This may be the type of conduct which we would still want to prohibit, even though such conduct may not be a classic "tie-in" under the state and

federal antitrust laws because a cellular carrier may not be found to have market power in the service market.[22] We request comment on whether some minimal requirement against bundling should be maintained. Finally, we request comment on how our current policy regarding bundling should be applied to cellular carriers' agents and other distribution outlets.

21. Furthermore, in the event that we do eliminate or modify our current cellular bundling policy, we do not contemplate preempting related state regulatory action even if it is more restrictive. At the current time, we do not foresee that a nationwide bundling policy would be critical to meeting a federal policy such that preemption would be required. Moreover, regardless of whether or not we clarify or modify our cellular bundling policy, facilities-based carriers who provide cellular CPE and cellular service on a packaged basis will continue to be required to offer cellular service to agents, resellers and other customers subject to the just and reasonable provisions of Section 201(b)[23] of the Communications Act (Act) and the nondiscrimination provisions of Section 202(a)[24] of the Act.

IV. REGULATORY FLEXIBILITY - INITIAL ANALYSIS

22. *Reason for action and objectives.* We are proposing to modify our rule governing bundling of cellular customer premises equipment (CPE) and cellular service. The objective of this proposal is to provide effective and adaptive regulation for communications.

23. *Legal Basis.* Authority for this notice is contained in Sections 1, 4(i), 4(j) and 303 of the Communications Act of 1934, 47 U.S.C. Sections 151, 154(i) 154(j) and 303.

24. *Description, potential impact and number of small entities affected.* None.

25. *Federal rules which overlap, duplicate or conflict with these rules.* None.

26. *Significant alternatives minimizing impact on small entities and consistent with stated objectives.* None.

27. *Reporting, record keeping, and compliance requirements.* None.

V. PAPERWORK REDUCTION ACT OF 1980

28. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found not to impose any new or modified information collection requirements on the public.

VI. EX PARTE PRESENTATIONS

29. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

30. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

31. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206.

32. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **May 20, 1991** and reply comments on or before **June 4, 1991.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

VII. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), and 154(j) and 303, that there is ISSUED A NOTICE OF PROPOSED RULE MAKING.

34. IT IS FURTHER ORDERED, that the petition for declaratory ruling filed by the National Cellular Resellers Association IS DISMISSED.

35. A copy of this Notice of Proposed Rule Making shall be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (5 U.S.C. Section 601, *et seq.*).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

1. American Mobile Communications, Inc.
2. Ameritech Mobile Communications, Inc.
3. Bell Atlantic Mobile Systems
4. BellSouth Corporation
5. Cellcom Corp.
6. Cellular Information Systems, Inc.
7. Cellular Service, Inc.
8. Cellular Tel
9. Cellular Telecommunications Industry Association
10. Cellular Telephone Company
11. Centel Cellular Company
12. Century City Cellular, Inc.
13. Contel Corporation
14. Continental Mobile Telephone Company, Inc.
15. McCaw Cellular Communications, Inc.
16. Metro Mobile CTS, Inc.
17. Michael F. Husk
18. National Association of Cellular Agents
19. National Cellular Resellers Association
20. Nationwide Cellular Service, Inc.
21. NYNEX Mobile Communications Company
22. Providence Journal Telecommunications, Inc.
23. PacTel Cellular
24. Rochester Telephone Mobile Communications
25. San Diego Cellular Communications, Inc.
26. Southwestern Bell Mobile Systems, Inc.
27. Telocator
28. TRAC Communications, Inc. and Mobiltronics, Inc. (collectively TRAC)
29. United States Telephone Association
30. US WEST NewVector Group, Inc.

LIST OF REPLY COMMENTERS

1. Allstate Cellular
2. Ameritech Mobile Communications, Inc.
3. BellSouth Corporation
4. Cellular Telephone Company
5. Cellular Telecommunications Industry Association
6. Michigan Association of Cellular Agents, Inc.
7. National Cellular Resellers Association
8. PacTel Cellular
9. Providence Journal Telecommunication, Inc.
10. NYNEX Mobile Communications Company
11. Rochester Telephone Mobile Communications
12. TRAC

EX PARTE COMMENTS OR PRESENTATIONS

1. Bell Atlantic Mobile Systems
2. Cellular Telecommunications Industry Association
3. GTE Mobilnet and GTE Service Corporation
4. McCaw Cellular Communications
5. National Cellular Resellers Association
6. Pacific Telesis
7. Tandy Corporation
8. TRAC

FOOTNOTES

[1] NCRA states that on December 6, 1988, it filed pleadings in another proceeding (*See* Public Notice DA 88-1578 (released October 7, 1988)) concerning the Commission's policies on the resale of cellular radio service. It indicates that the pleadings reference the Commission's unbundling requirement and provide documentation of numerous instances where cellular carriers have allegedly violated the unbundling requirement. NCRA therefore requests that the earlier filed pleadings be incorporated into the instant petition.

[2] Section 202(a) of the Act prohibits carriers from discriminating unreasonably among customers in the "charges, practices, classifications, regulations, facilities, or services" for "like" communication service.

[3] *See* Appendix A for listing of all commenters. In addition, *ex parte* comments were filed by several parties and, in accordance with Section 1.1206 of our Rules, have been made part of the record in this proceeding.

[4] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), *Final Decision*, 77 FCC 2d 384; *modified on recon.*, 84 FCC 2d 50 (1980); *further modified* 88 FCC 2d 512 (1981), *aff'd sub nom., Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, FCC 84-190, (released May 4, 1984).

[5] *Id.* at 442-43, para. 149.

[6] *Id.* at 444-45, para. 154.

[7] *Cellular Communications Systems* (*Cellular Report and Order*), 86 FCC 2d 469, 497 (1981) *modified*, 89 FCC 2d (*Reconsideration Order*), *further modified*, 90 FCC 2d 571 (1982) (*Further Reconsideration Order*) *appeal dismissed sub nom. U. S. v. FCC*, No. 82-1526 (D.C. Cir. March 3, 1983).

[8] *Cellular CPE*, 57 Rad. Reg. (P&F) 989, 990 (1985) (wherein the Commission stated that CPE should be provided on a competitive, unregulated basis, citing *Second Computer Inquiry*).

[9] According, we will not rule on the instant petition for declaratory ruling at this time. However, the comments and reply comments submitted in this proceeding will be made a part of the Notice of Proposed Rule Making.

[10] We note, however, that even if we were to eliminate our unbundling requirements, cellular carriers would still have to comply with federal antitrust laws which prohibit unlawful tying arrangements that unreasonably restrain trade. *See* Section 3 of the Clayton Act, 15 U.S.C. § 14.

[11] *See* Krattenmaker, Lande, and Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Georgetown L.J. 241, 259 (1987) (stating that exclusionary conduct that reduces the likelihood of price decreases should be considered a form of monopoly or market power because such conduct can delay or prevent prices from falling by preventing the entry of or raising the costs of more efficient competitors).

[12] Carriers could use minimum service commitments as a vehicle for predatory pricing or other anticompetitive behavior only to the extent that they could eliminate competition and monopolize the cellular market. *See* Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U. S. 574, 589 (1986).

[13] Without adequate justification, a carrier may not charge different rates or impose different terms and conditions for like (functionally equivalent) services. Western Union International, Inc. v. Federal Communications Commission, 568 F.2d 1012 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978); American Trucking Associations v. Federal Communications Commission, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967)

[14] In *Cellular Report and Order*, 86 FCC 2d at 478, the Commission concluded that even a "marginal amount of facilities-based competition in the market will foster public benefits of diversity of technology, service and price."

[15] *Cellular CPE*, 57 Rad. Reg. (P&F) at 1002. The Commission stated that cellular is not a monopoly service. The Commission also noted that BOC cellular carriers must compete with other carriers and resellers who are able to offer "one stop shopping" for cellular service and CPE. *Id.* at 992. The Commission, however, retained the bundling restriction.

[16] *See, e.g.*, California Public Utility Commission, Decision Nos. 90-06-25 (June 6, 1990) and 90-10-47 (October 12, 1990).

[17] In addition, because the largest local exchange telephone companies offer cellular service through subsidiaries separate from regulated operations, cellular service costs apparently do not appear in regulated books of account at the state or federal level.

[18] In this regard, we seek comments on what effect, if any, the antibundling laws in California and North Carolina have had on cellular service prices.

[19] These types of arrangements do not restrict customer CPE options because customers are still free to purchase their own CPE and go to any facilities-based cellular carrier or reseller to obtain service.

[20] Even though the first cellular system was licensed only seven years ago, the industry is moving toward converting to digital in the near future. In addition, the industry continues to increase investment to improve service as technology improves, *e.g.*, to permit intersystem handoff between otherwise incompatible systems.

[21] Packaged offerings are commonplace in a variety of industries in which customers can purchase a number of goods in a package at a lower price than the individual goods could be purchased separately. Under the federal antitrust laws, these packaged offerings are legal unless they constitute an illegal tie-in or otherwise represent an unlawful exercise of monopoly power. *See* Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956); Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980).

[22] *Cf.* Metro Mobile CTS, Inc. v. NewVector Comm., Inc., 661 F. Supp. 1504 (D. Ariz. 1987), *aff'd* 892 F.2d 62 (9th Cir. 1989) (wireline carrier found not to have market power during the "headstart" period in lawsuit alleging monopolization under Section 2 of the Sherman Act).

[23] Section 201(b) of the Act provides that: All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . . .

[24] Section 202(a) makes it unlawful: for any common carrier to make any unjust and unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . .

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Notice of Proposed Rule Making Concerning the Commission's Cellular Bundling Policies

I am voting with my fellow Commissioners to seek comment on whether the packaging of cellular CPE with transmission service violates the FCC's longstanding proscription against bundling. I am somewhat troubled, however, by the industry's practice of offering deep cellular CPE discounts on the condition that the customer also subscribe to a fixed term of cellular service. The FCC's prohibition on bundling has led in large measure to the vigorous competition we now see in the CPE market generally. I hesitate, therefore, to walk away from our unbundling policy in the cellular market.

Certainly it is worth asking whether the cellular market possesses unique characteristics that might justify a finding that limited bundling of equipment and service is in the public interest. Providing cellular service requires a high up-front capital investment; cellular carriers need to load their systems in order to recover that investment. But the high cost of cellular equipment may be a barrier to potential cellular customers -- particularly to non-business customers. If the comments show that it is essential for cellular providers to price CPE at a huge discount -- as a loss-leader -- then it might be in the public interest to permit this kind of pricing.

On the other hand, there may be other ways to attract new customers to cellular service. For example, if we were to prohibit bundling, mightn't service providers then attempt to attract new customers through innovative pricing plans and through promotions aimed at new subscribers?

We should recognize that there may be dangers in permitting cellular carriers to tie deep discounts in CPE to basic service. This practice may make it more difficult, for example, for resellers to compete with established facilities-based cellular carriers. Another concern is that bundling may limit competition in the cellular CPE market, a market that will see considerable changes as cellular carriers convert to digital technology. Finally, if we should permit bundling, it will be necessary to consider whether to prohibit exclusive dealing arrangements and unduly long term service contracts.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-67

In the Matter of

Revision of License Renewal
Announcement Requirements for
Low Power Television, Television
Translator, Television Booster,
FM Translator and FM Booster
Stations

NOTICE OF PROPOSED RULE MAKING

Adopted: March 14, 1991; Released: March 27, 1991

By the Commission:

1. The Commission hereby seeks comment on several proposals to modify the rules governing the license renewal announcements that low power television ("LPTV") stations are required to make. At present, the Commission's Rules contain two different sets of requirements. LPTV licensees that locally originate programming must comply with the announcement requirements of Section 73.3580(d)(1), while other LPTV licensees are governed by Section 73.3580(g).[1] The principal difference between these two sections is that under the former, LPTV licensees that locally originate programming must broadcast announcements over the air on their stations, while under the latter, other LPTV licensees must publish their announcements in a newspaper. Both types of announcements, however, must contain basic facts informing the public that the licensee has applied for renewal of its license.

2. On June 16, 1988, Community Broadcasters Association ("CBA") submitted a petition for rule making to modify the text and timing of the announcements required of locally originating LPTV operators. CBA identified two specific problems with the current announcement requirements. The first problem stems from the requirement that LPTV licensees who locally originate programming must make pre-filing announcements in the period from 6 p.m. to 11 p.m. (5 p.m. to 10 p.m. Central and Mountain Time) and various post-filing announcements at a number of specific times throughout the broadcast day. CBA pointed out that LPTV stations are not required to operate on a set schedule, and therefore a licensee may not be able to comply with the required broadcast times.

3. The second problem cited by CBA is that the required broadcast text contains statements that do not accurately reflect LPTV renewal obligations. Specifically, CBA asserts that the text incorrectly implies that LPTV licensees must maintain public inspection files and that information regarding the broadcast license renewal process is available at the LPTV station. CBA also observes that the text erroneously suggests that an LPTV renewal application contains information about the station's performance during the prior license term.

4. To alleviate the above-described problems, CBA proposes two types of amendments to Section 73.3580(d). The first type of amendment would allow LPTV licensees to omit from their broadcast announcements any reference to a public inspection file or their prior performance record. The second type of amendment would advise LPTV stations originating programming that they may comply with the broadcast scheduling requirements by making announcements as close to the designated times as possible, depending on when they originate their programming.

5. CBA has correctly identified several problems with the rules governing LPTV renewal announcements, and we seek comment on its proposals for curing those problems. There are, however, other options that may, in a simpler fashion, resolve the problems cited by CBA. For example, we could extend the newspaper announcement requirements of Section 73.3580(g) to all LPTV operators, regardless of whether the station originates programming. The broadcast announcement requirement for LPTV licensees would then be eliminated altogether.[2] This option would result in consistent treatment for all LPTV operators and would further the Commission's goal of enhancing the viability of emerging video services by simplifying the rules.

6. Also, by using a newspaper announcement requirement instead of a broadcast requirement for LPTV licensees that locally originate programming, we would solve any problem an LPTV operator may have complying with Commission notice requirements due to varying broadcast schedules. Additionally, the use of a newspaper announcement text that complies with the requirements of Section 73.3580(g) would alleviate the problems posed by the misleading statements in the current broadcast announcement text. For example, an acceptable newspaper text under 73.3580(g) -- unlike the current broadcast text -- need not mention a public file and thus does not imply that an LPTV licensee has an obligation to maintain such a file. We seek comment on this proposal.

7. Applying the newspaper announcement requirement of 73.3580(g) to all LPTV licensees, however, raises one concern. Under the current approach, LPTV licensees that locally originate programming must include in their broadcast announcements a statement that informs the public that it can participate in the renewal process. In contrast, the newspaper announcement requirement of 73.3580(g) does not mention this right to participate. While Section 73.3580(g) can be expanded to require that a locally originating LPTV licensee notify the public of this right, we seek comment on whether such a requirement should be imposed on the other broadcast services covered by Section 73.3580(g) -- that is, on LPTV stations that do not locally originate programming, TV translators, TV boosters, FM translators and FM boosters.

8. We request comment on the aforementioned proposals and on any other proposals that would remedy the problems CBA identifies.[3] To recapitulate, the major questions we ask commenters to consider are as follows:

(a) Should LPTV operators locally originating programming continue to be subject to the broadcast renewal announcement requirements of Section 73.3580(d) and, if so, should we rectify the renewal announcement problems discussed above by modifying that section in the manner proposed by CBA?

(b) Alternatively, should we treat all LPTV operators the same by placing LPTV licensees that locally originate programming under the newspaper announcement requirement of Section 73.3580(g)? If we take this approach, should we require all the broadcast licensees covered by Section 73.3580(g), regardless of whether or not they originate programming, to inform the public that it can participate in the renewal process?

ADMINISTRATIVE MATTERS

9. Authority for this *Notice of Proposed Rule Making* is contained in Sections 4, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 403.

10. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **May 20, 1991,** and reply comments on or before **June 4, 1991.** Extensions of these times are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

11. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally*, 47 CFR § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice stating that the matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 CFR § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence or the resolution of issues in the proceeding. 47 CFR § 1.1203.

12. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 CFR § 1.1202(b). Any person who makes or submits a written *ex parte* presentation must provide, on the same day it is submitted, two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary and must be labeled or captioned as an *ex parte* presentation.

13. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 CFR § 1.1206.

14. *Regulatory Flexibility Act Initial Analysis:* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA, which is set forth as Appendix A. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981)

15. *Paperwork Reduction Act:* The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

16. For further information on this proceeding, contact Kathleen O'Brien Ham, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. **Reason for the Action:** This action is taken to simplify and clarify license renewal announcement requirements of low power television operators.

2. **Objective of this Action:** By this action, the Commission seeks to simplify and rationalize its rules for LPTV license renewal announcements.

3. **Legal Basis:** Authority for this action is found in Sections 4, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 403.

4. **Number and Type of Small Entities Affected by the Proposed Rule:** There are approximately 750 licensed LPTV operators that could be affected by the rule.

5. **Reporting, Recordkeeping and Other Compliance Requirements Inherent in the Proposed Rule:** The proposed rule changes may lessen or marginally increase the reporting, recordkeeping and other compliance requirements, and may simplify compliance.

6. **Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rule:** None.

7. **Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:** We are seeking comment to determine if any significant alternatives exist.

FOOTNOTES

[1] Section 73.3580(g) applies to all LPTV licensees that do not locally originate programming, such as licensees that rebroadcast exclusively satellite or microwave-fed programming. In addition, Section 73.3580(g) applies to TV translator, TV booster, FM translator and FM booster stations.

[2] Another possibility is that we could allow LPTV operators who originate programming to meet their renewal announcement obligation by allowing them to choose between an over-the-air broadcast or a newspaper notice. We invite commenters to consider this proposal as well.

[3] We also request comment on other related discrepancies or inaccuracies that may exist or arise in our announcement requirements. *See e.g.*, 47 CFR § 73.3580(h) (instructing licensees -- apparently including LPTV licensees -- to place in the public inspection file certifications of compliance with Section 73.3580).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2852

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: March 15, 1991; Released: March 18, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2852 to modify Virtual Telecommunications Network Service (VTNS) Option 9 under Tariff F.C.C. No. 12, by which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations.

2. The Transmittal 2852 revisions to Option 9: provide the ability to add data transmission capabilities (DTCs) at additional speeds; decrease the basic charge for this option and modify the service elements included in the basic charge; increase the measured charges; increase the minimum annual charge; modify the outage credit units; introduce change charges for the additional DTCs and modify certain DTC thresholds; and modify the domestic DTC and voice transmission capabilities (VTCs) volume pricing plan. *See* AT&T Transmittal No. 2852 Description and Justification at 1-7.

3. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or suspend and investigate the modifications to Option 9 on February 1, 1991, and AT&T filed a reply on February 14, 1991.

4. Williams contends that the rationale for allowing AT&T to file new Tariff 12 options without meaningful Commission review has been completely undermined by the Tariff *12 Remand*.[1] Williams Petition at 2. Williams further argues that AT&T has failed to demonstrate that modified Option 9 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. *Id.* at 2-11. Williams also alleges that even if modified Option 9 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 12. Williams further alleges that modified Option 9 violates the Commission's policy against geographic rate deaveraging and that it is not generally available. *Id.* at 14-18. Williams also argues that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. *Id.* at 17.

5. Additionally, Williams contends that if Tariff 12 options are like other AT&T services, they violate Section 503(a) of the Communications Act because the Tariff 12 customers will have received an offset against the regular charges, *i.e.*, a rebate. *Id.* at 12-14. Williams also contends that AT&T's cost support is inadequate. *Id.* at 20-22. Finally, Williams argues that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if modified Option 9 takes effect. *Id.* at 22-24.

6. AT&T replies that the *Tariff 12 Remand* creates no basis to reject or suspend new or revised VTNS offerings. Rather, AT&T argues that it confirms AT&T's right to compete effectively in the large user market. AT&T Reply at 3-4. In addition, AT&T contends that the Commission's finding that integrated service packages are not "like" combinations of piece-part services obtained under AT&T's other tariffs is fully consistent the Court of Appeals' decision. *Id.* at 5-6. AT&T also argues that claims of discrimination among VTNS options are unfounded because all options are generally available (and generate positive net revenues). *Id.* at 6. Further, AT&T claims that allegations of inadequate cost support are totally unfounded. *Id.* at 6.

7. The Common Carrier Bureau has reviewed AT&T Transmittal 2852 and the petition filed by Williams. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

8. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990). Although this transmittal does not present new questions that warrant investigation at this time, it could be affected by the pending remand proceedings in CC Docket No. 87-568. Accordingly, Transmittal 2852 takes effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

9. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal 2852, filed by Williams Telecommunications Group, Inc., IS DENIED.

10. IT IS FURTHER ORDERED that Transmittal 2852 takes effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI TelecommunicationsCorp.v.*FCC, 917 F.2d 30 (D.C. Cir. 1990) (*Tariff 12 Remand*), *rev'g & remanding* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928(1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2793

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: March 19, 1991; Released: March 19, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2793 to introduce Virtual Telecommunications Network Service (VTNS) Option 83 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for Option 83 are stabilized for a three-year period, with an option to renew service for an additional one-year or two-year period if AT&T and the customer agree. *See* AT&T Transmittal No. 2793 Description and Justification at 1-4. The basic charge for Option 83 is $105,066 per month. *Id.* at 5.

2. Competitive Telecommunications Association (CompTel) filed a petition to reject or suspend and investigate Option 83 on January 4, 1991. MCI Telecommunications Corp. (MCI) and Williams Telecommunications Group, Inc. (Williams) filed petitions to reject or suspend and investigate on January 7, 1991. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate on January 8, 1991. AT&T filed a reply on January 14, 1991.

3. Petitioners contend that Option 83 raises the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand* [1] and must be reviewed in light of the remand. *See* Sprint Petition at 5; MCI Petition at 2; Williams Petition at 2; CompTel Petition at 3. Petitioners also argue that Option 83 impermissibly bundles 800 Service with SDN Service for the application of the Domestic Usage Volume Pricing Plan in violation of Section 201(b) of the Communications Act. *See* MCI Petition at 4; Williams Petition at 23-24; CompTel Petition at 6-7 (also alleging that AT&T is unlawfully leveraging its market power in international services).

4. Sprint argues that AT&T has failed to demonstrate that Option 83 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Sprint Petition at 6-8. Further, Sprint contends that even if Option 83 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 8-9.

5. MCI charges that Option 83 is comprised of constituent offerings that are available under standard AT&T tariffs and under other Tariff 12 service arrangements, and that AT&T has not provided adequate cost support as required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, to justify price differences between or among these services. MCI also contends that the Commission will need to review the underlying contracts to determine reliably whether price differences between Option 83 and other Tariff 12 options are justified. MCI Petition at 3-5 & 5 n.6.

6. Williams argues that Tariff 12 options are not generally available and that AT&T's cost support is inadequate. Williams Petition at 16-20; *see also* CompTel Petition at 7-9. Williams also claims that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. Williams Petition at 20-21. Williams further contends that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if Option 83 takes effect. *Id.* at 26-28.

7. AT&T replies that the Tariff *12 Remand* "creates no conceivable basis to reject or suspend VTNS offerings." Rather, AT&T argues that it "reaffirms AT&T's right 'to compete effectively . . . in the large user market.'" AT&T Reply at 3 (quoting *Tariff 12 Remand*, 917 F.2d at 42. In addition, AT&T contends that the Commission correctly found that integrated service packages are not "like" combinations of piece-part services obtained under AT&T's other tariffs. *Id.* at 3-4.

8. AT&T also argues that claims of discrimination among VTNS options are unfounded because all options are generally available (and generate positive net revenues). AT&T further contends that since VTNS is not "like" a combination of separately tariffed services such as 800 Service and SDN, any prohibition against such an offering would not apply. *Id.* at 4. Finally, AT&T claims that allegations of inadequate cost support are totally unfounded. *Id.* at 4-5.

9. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2793, the petitions filed by MCI, Williams, and CompTel, and related pleadings. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

10. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990). Although this transmittal does not present new questions that warrant investigation at this time, it could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal No. 2793 takes effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

11. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2793 filed by US Sprint Communications Company Limited Partnership, MCI Telecommunications Corp., Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

12. IT IS FURTHER ORDERED that Transmittal No. 2793 takes effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone;
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI Telecommunications Corp. v.* FCC, 917 F.2d 30 (D.C. Cir. 1990) (*Tariff 12 Remand*), *rev'g & remanding*AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TACONIC LONG DISTANCE SERVICE CORP. — File No. I-T-C-91-027

Application for authority to operate as an international resale carrier.

RCI LONG DISTANCE NEW ENGLAND, INC. — File No. I-T-C-91-028

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 20, 1991; Released: March 28, 1991

By the Chief, International Facilities Division:

1. The above-captioned applications, filed by Taconic Long Distance Service Corp. (TLD) and RCI Long Distance New England, Inc. (RCI New England), respectively, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on November 23, 1990. No comments were received.

2. The applicants are domestic resale carriers. They now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by TLD and RCI New England.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-027 and I-T-C-91-028 ARE GRANTED and: (a) RCI New England is authorized to provide international switched voice services by the resale of the international switched voice services set forth in MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs; and (b) TLD is authorized to provide international switched voice services by the resale of the international switched voice services set forth in RCI Corporation's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e. g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ICON COMMUNICATIONS CORP. File No. I-T-C-91-041

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 20, 1991; Released: March 28, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed by ICON Communications Corporation (ICON), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on December 19, 1990. No comments were received.

2. ICON is a domestic resale carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by ICON.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-91-041 IS GRANTED and ICON is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PHOENIX NETWORK, INC. File No. I-T-C-91-052

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 20, 1991; Released: March 28, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed by Phoenix Network, Inc. (Phoenix), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on January 30, 1991. No comments were received.

2. Phoenix is a communications carrier providing domestic resale service. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Phoenix.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-91-052 IS GRANTED, and Phoenix is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariffs F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AFFORD-A-CALL CORP. File No. I-T-C-91-047

Application for authority to supplement existing authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 21, 1991; Released: March 28, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed by Afford-A-Call Corp. (Afford-A-Call), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to supplement its existing authorization to resell international switched voice services of additional carriers. The application was placed on public notice on January 25, 1991. No comments were received.

2. The commission has previously granted authority to Afford-A-Call, as a non-dominant carrier, to provide resale of international switched voice services under AT&T's Tariff F.C.C. No. 1, between the U.S. and those points listed in that AT&T tariff.[1] It now proposes to resell international switched voice services of additional carriers in competition with other common carriers already providing resale of such services. As addressed in File No. I-T-C-88-063, 3 FCC Rcd 1619 (1988), in authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[2] We find that the market will support additional carriers and that the added competition will be in the public interest. [3]

3. Accordingly, IT IS ORDERED that application File No. I-T-C-91-047 IS GRANTED, and Afford-A-Call is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 2, MCI's Tariff F.C.C. No. 1, TRT's Tariff F.C.C. No. 2, US Sprint's Tariffs F.C.C. Nos. 1 and 2 and RCI Long Distance's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs.

4. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Letter dated September 11, 1989 from George S. Li, Chief, International Facilities Division, Common Carrier Bureau, to Randall B. Lowe, *In the Matter of Afford - A - Call Corp. and Grace Communications, Inc. d/b/a Afford-A- Call for Authorization for Transfer of Certificate of Public Convenience and Necessity*, File No. I-T-C-89-147-(AL), authorizing the transfer of the International Section 214 Authorization held by Grace Communications, Inc. to Afford-A-Call Corp. The Grace Communications authorization was originally granted *In the Matter of Grace Communications, Inc.*, 3 FCC Rcd 1619 (1988), File No. I-T-C-88-063.

[2] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[3] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-440

In re Applications of

ACHERNAR BROADCASTING COMPANY — File No. BPCT-860410KP

LINDSAY TELEVISION, INC. — File No. BPCT-860410KQ

For Construction Permit for a
New Television Station,
Channel 64,
Charlottesville, Virginia

ORDER

Adopted: March 20, 1991; Released: March 28, 1991

By the Commission:

1. This case is before us on appeal from a decision of the Review Board, 5 FCC Rcd 6309 (1990). In light of the circumstances noted here, we are calling for further comments from the parties concerning certain questions.

2. Because its site is inside the "Quiet Zone" that the Commission established in 1958 for the protection of the National Radio Astronomy Observatory (NRAO) at Green Bank, West Virginia, Achernar was required by 47 C.F.R. § 73.1030(a) to notify the NRAO so that the NRAO might raise any objection to granting its application.[1] The NRAO did object, but stated that it would withdraw the objection if Achernar were to modify the design of its proposed facility so as to suppress radiation in the direction of Green Bank to a certain level. As Achernar refused to modify its proposal (which specifies use of an omnidirectional antenna), the HDO specified an issue as to whether its proposed station would cause objectionable interference to the NRAO.

3. The ALJ resolved the NRAO interference issue against Achernar in the Initial Decision, held that Achernar was therefore disqualified, and granted Lindsay's application instead. 3 FCC Rcd 5421 (1988). Achernar argued in exceptions to the Review Board that it was pointless to disqualify it in order to protect the NRAO, because Lindsay's proposed station would also render Channel 64 unusable for the NRAO, although it would be outside of the Zone. Holding that it was "essential to establish what will be the impact on radio astronomy. . . in the Quiet Zone of a grant of either application," the Board remanded for further hearing under an issue to determine whether either or both of the proposed stations would render Channel 64 unusable for the NRAO's purposes. 4 FCC Rcd 3629, 3630 ¶ 8 (1989).

4. In a Supplemental Initial Decision, the ALJ found that *both* proposed stations, while in operation, would render Channel 64 totally unusable for the NRAO. 5 FCC Rcd at 967 ¶ 49. Achernar would exceed the maximum tolerable level by 60,013 times, and Lindsay would exceed it by 22,856 times. Achernar would block a bandwidth of 10 MHz from NRAO observation, and Lindsay would block 8 MHz. *Id.* at ¶ 50.

5. The ALJ considered a recommendation by the Commission's Mass Media Bureau that a grant of either application be restricted by requiring the licensee to go off the air between midnight and 6:00 a.m. after receipt of 30 days' advance notice from the NRAO of an intention to monitor radiation in the frequency range of Channel 64 during those hours on a specified date. Achernar declared that it would accept a grant with such a restriction, but Lindsay opposed the Bureau's recommendation, and the NRAO opposed granting either application, with or without the restriction. The ALJ agreed with the NRAO that the proposed restriction was inadequate, so he denied both applications. *Id.* at 969 ¶¶ 59-62.

6. The Review Board decided, however, that it should not disqualify either applicant under the interference issues. It reasoned that it could not properly deny Lindsay's application based on the prospective impact on the NRAO because the specified issues only go to Achernar's basic eligibility and because it is a question of first impression whether an application for a site outside the Quiet Zone could be denied for such a reason. 5 FCC Rcd 6309, 6311 ¶ 10. The Board therefore concluded that it would make no sense to deny Achernar's application in order to protect the NRAO, in view of the fact that denial of that application would result in grant by default of another that would interfere with the NRAO to nearly the same extent. *Id.* Turning to the comparative evaluation, the Board refused to give Achernar a claimed 307(b) preference for superior gray-area coverage and then held that Lindsay deserved to prevail because its integration enhancements outweighed Achernar's. *Id.* at 6313 ¶ 16.

7. The Board declined to attach the Bureau's proposed restriction to its grant to Lindsay. Noting that there was no precedent for attaching such a restriction to a grant to an applicant proposing a location outside of the Quiet Zone, the Board said that it was up to the Commission to take such action. *Id.* at 6311 ¶ 9; 6313 n.5.

8. Achernar contends in its application for review filed on November 29, 1990 that the Board erred in refusing to give it a 307(b) preference, in refusing to charge Lindsay with a diversification demerit, and in awarding Lindsay full quantitative integration credit despite allegedly conflicting business commitments. Lindsay filed an opposition to the appeal on December 14, 1990, but neither the Bureau nor the NRAO has responded to the application for review.

9. No party has addressed the Board's holding that the specified interference issues do not go to Lindsay's eligibility or its consequent reversal of the ALJ's holding that neither Lindsay's nor Achernar's application should be granted because of the interference that they would cause to the NRAO. *Id.* at 6311 ¶ 10. In view of the important and unusual public interest ramifications of this case, it would assist our consideration of this proceeding to have further presentations by the parties regarding these matters.

10. ACCORDINGLY, IT IS ORDERED that the parties SHALL FILE comments within 15 days of the release of this order addressing these points: (a) whether it is likely that Lindsay could produce additional evidence having a material bearing on the relative importance to the public interest of granting its application versus protecting the NRAO and (b) whether it would best serve the public interest to deny the applications of both Achernar and Lindsay on the basis of the current evidentiary record because of the detrimental effect that the proposed operations would have on the NRAO.

11. IT IS FURTHER ORDERED that the parties MAY FILE reply comments within 7 days of the deadline for filing the comments.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] The same rule provides that upon receipt of an objection from the NRAO to a proposal to establish a new station in the Quiet Zone or to alter the facilities of an existing station therein the Commission "will consider all aspects of the problem and take whatever action is deemed appropriate."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Parts 2 and 25 to
Implement the Results of the 1985
and 1988 Orbital Conferences

REPORT AND ORDER

Adopted: March 12, 1991; Released: April 1, 1991

By the Commission:

1. By this action, the Commission updates the Table of Frequency Allocations, 47 CFR 2.106, to conform with the decisions reached at two international conferences. These revisions ensure all administrations equitable access to the geostationary-satellite orbit and to the frequency bands allocated to space services. We are also modifying the definitions for deep space, feeder link, and fixed-satellite service in Parts 2 and 25 of our rules to reflect the new international definitions of these terms.

2. During the 1979 Geneva general World Administrative Radio Conference (WARC), the International Telecommunication Union (ITU) resolved to convene a specialized WARC to be held in two separate sessions. The first session (Orb-85), which planned space services using the geostationary-satellite orbit, was held in Geneva in 1985. The second session (Orb-88), which met in Geneva in 1988, concerned the use of the geostationary-satellite orbit and planned which space services could use the orbit. These international conferences adopted modifications affecting 17 of the footnotes contained in the *Radio Regulations*' Table of Frequency Allocations (ITU table). More specifically, they modified footnotes 836, 837, 839, 842, 844, 846, 847, 858, 863, 868, 869, and 884; deleted footnotes 792, 840, 841, and 843; and added a new footnote 792A.

3. The Commission's Table of Frequency Allocations, as set forth in Section 2.106 of its rules, provides a complete listing of both the international frequency allocations and the United States domestic frequency allocations. The table is divided into the International Table and the United States Table. The United States Table is divided into the Government Table of Frequency Allocation and the Non-Government Table of Frequency Allocation. The Government plan, as shown in column 4 of Section 2.106, is administered by the National Telecommunications and Information Administration (NTIA), whereas the non-Government plan, as shown in column 5 of Section 2.106, is administered by this Commission.[1]

4. We are amending our Table of Frequency Allocations to reflect the modifications made in the ITU table by the Orb-85 and Orb-88 conferences. These rule changes will update our regulations so that they agree with the new international frequency use regulations in the ITU table. The specific rule changes we are adopting to implement Orb-85 and Orb-88 are discussed below.

5. Certain of the Orb-85 and Orb-88 modifications do not affect the United States Table, and pertain only to international allocations. These are the changes modifying footnotes 837, 842, 847, 858, 863, and 868; and deleting footnote 792. We are amending the International Table in our rules to reflect these changes to the ITU table. In making these changes, we note that the revised footnote 836 establishes power limits for fixed-satellite service (FSS) transponders in the 11.7-12.2 GHz band when they are used for the broadcast-satellite service (BSS). This footnote also provides the same level of interference protection for BSS as is now authorized for FSS. Also, the revised footnote 846 allows for use of the 12.2-12.7 GHz BSS band by the FSS. The United States did not support the adoption of these footnotes at the 1979 World Administrative Radio Conference (WARC), Geneva, and did not implement them on a domestic basis. Although the language of the footnotes was modified somewhat by the Orb-85, the essence of these two footnotes has not changed since the 1979 WARC. The remaining footnotes concern modifications that do not affect the operation of radio service authorized by the Commission. We also exclude footnote 869 from the United States Table since footnote US271 to the National allocation conveys the same limitation.

6. The remaining Orb-85 and Orb-88 changes reflect international agreements that apply to Region 2 and, therefore, require revision to both the International Table and the United States Table. Specifically, the Orb-85 and Orb-88 agreements necessitate that these tables be revised by modifying footnotes 839, 844, and 884; deleting footnotes 840, 841, and 843; and adding new footnote 792A. The modified footnote 839 limits fixed-satellite service and broadcasting-satellite service licensees operating in the 11.7-12.2 GHz band to national and subregional systems. The new version of Footnote 844 requires terrestrial radio communications services operating in the 12.2-12.75 GHz band to avoid causing harmful interference to space services operating in conformity with the Broadcast-Satellite Plan for Region 2 contained in Appendix 30 to the *Radio Regulations*. Finally, the modified footnote 884 establishes power flux-density limits for the band 31-31.3 GHz. The National Aeronautical Space Administration (NASA) is the only current user of this band and is in compliance with the specified limits. Footnotes 840, 841, and 843 are no longer applicable and, therefore, are deleted. Footnote 792A replaces deleted footnote 792 and establishes international requirements to ensure all countries access to the fixed-satellite service bands at 4500-4800 MHz, 6725-7025 Mhz, 10.7-10.95 GHz, 11.2-11.45 GHz, and 12.75-13.25 GHz. Appendix 30B to the *Radio Regulations* specifies the allowed usage of these bands. We are amending the International Table and the United States Table in our rules to make them agree with these changes adopted at the Orb-85 and Orb-88 sessions.

7. As stated above, we are also revising the Parts 2 and 25 definitions for deep space, feeder link, and fixed-satellite service to be consistent with the Final Acts of Orb-88. The new difinition of deep space will allow for the study of the moon in the space research service. The definitions of feeder link and fixed-satellite service now include transportable earth stations.

8. Pursuant to section 553(b)(B) of the Administrative Procedure Act, we find that good cause exists for implementing these modifications to the rules without notice and comment.[2] The changes we are implementing in this

Report and Order reflect actions adopted at international conferences in which the United States participated, after receiving public input, and did not take reservations. These rule changes will codify the technical standards that domestic licensees must now comply with if they operate internationally. We note, however, that domestic licensees in services affected by the changes being made herein already operate within the technical limitations and other rules established by the Orb-85 and Orb-88 conferences. The modifications to footnotes not listed in the United States Table will not affect U.S. licensees. Therefore, the rule changes adopted herein are not expected to have a substantive effect on any existing U.S. telecommunications operations. Accordingly, we conclude that these rule changes are non-controversial and that they may be adopted without prior notice and comment.

ADMINISTRATIVE

9. The modifications contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

10. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

11. Accordingly IT IS ORDERED that Sections 2.1, 2.106, and 25.201 be amended as specified in the following appendix, effective 30 days after Federal Register publication.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 -- FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.1(c) is amended by revising the following definitions to read as follows:

Section 2.1 Terms and definitions.

* * * * *

Deep Space. Space at distances from the Earth equal to, or greater than, 2×10^6 kilometers.(RR)

* * * * *

Feeder Link. A radio link from an earth station at a given location to a space station, or vice versa, conveying information for a space radiocommunication service other than for the fixed-satellite service. The given location may be at a specified fixed point, or at any fixed point within specified areas.(RR)

Fixed-Satellite Service. A radiocommunication service between earth stations at given positions, when one or more satellites are used; the given position may be a specified fixed point or any fixed point within specified areas; in some cases this service includes satellite-to-satellite links, which may also be operated in the inter-satellite service; the fixed-satellite service may also include feeder links for other space radiocommunication services.(RR)

* * * * *

3. Section 2.106, the Table of Frequency Allocations, is amended as follows:

a. Footnote 792 is removed from column 2 of the band 4500-4800 MHz and its text is removed from the list of international footnotes;

b. Footnote 792A is added to columns 2 and 5 in band 4500-4800 MHz; to columns 2 in band 5925-7075 MHz; to column 5 in bands 6525-6875 MHz and 6875-7075 MHz; to columns 1, 2, and 5 in band 10.7-11.7 GHz; to columns 2 and 5 in band 12.75-13.25 GHz; and its text is added to the list of international footnotes;

c. Footnote 837 is added to column 5 in band 11.7-12.2 GHz;

d. Footnote 839 is added to column 5 in band 11.7-12.2 GHz and 12.2-12.7 GHz;

e. Footnote 840 is removed from columns 1, 2, 3, 4, and 5 of band 11.7-12.75 GHz and its text is removed from the list of international footnotes;

f. Bands 12.1-12.3 GHz and 12.3-12.7 GHz in column 2 are redivided as bands 12.1-12.2 GHz and 12.2-12.7 GHz. The new band 12.1-12.2 GHz in column 2 is a fixed-satellite service allocation and contains footnotes 836, 839, and 842. The new band 12.2-12.7 GHz is a fixed, mobile, braodcasting, and broadcasting-satellite services allocation and contains footnotes 839, 844, and 846.

g. The text of fotnote 841 is removed from the list of international footnotes.

h. The text of footnote 843 is removed from the list of international footnotes;

i. Footnote 884 is added to column 5 of the 31.0-31.3 GHz band;

j. The modified text of footnotes 836, 837, 839, 842, 844, 846, 847, 858, 863, 868, 869 and 884 replaces the current text in the list of international footnotes;

k. Upon updating our table of frequency allocations, the affected sections will look as follows (Due to space limitations, the new table must be shown broken into its international and United States sub-tables):

Section 2.106 Table of Frequency Allocations.

* * * * *

International table

Region 1--allocation MHz	Region 2--allocation MHz	Region 3--allocation MHz
(1)	(2)	(3)
* * * * *		
4500-4800	FIXED. FIXED-SATELLITE (space-to-Earth). MOBILE. 792A	
* * * * *		
5925-7075	FIXED. FIXED-SATELLITE (Earth-to-space). MOBILE. 791 792A 809	
* * * * *		

Region 1--allocation GHz	Region 2--allocation GHz	Region 3--allocation GHz
(1)	(2)	(3)
* * * * *		

10.7-11.7 FIXED. FIXED-SATELLITE (space-to-Earth) (Earth-to-space). 835 MOBILE except aeronautical mobile. 792A	10.7-11.7 FIXED. FIXED-SATELLITE (space-to-Earth). MOBILE except aeronautical mobile. 792A	
11.7-12.5 FIXED. BROADCASTING. BROADCASTING- SATELLITE Mobile except aeronautical mobile. 838	11.7-12.1 FIXED. 837 FIXED-SATELLITE (space-to-Earth). Mobile except aeronautical mobile. 836 839 12.1-12.2 FIXED-SATELLITE (space-to-Earth). 836 839 842 12.2-12.7 FIXED. MOBILE except aeronautical mobile. BROADCASTING. BROADCASTING- SATELLITE.	11.7-12.2 FIXED. MOBILE except aeronautical mobile. BROADCASTING. BROADCASTING- SATELLITE 838 12.2-12.5 FIXED. MOBILE except aeronautical mobile. BROADCASTING. 838 845
12.5-12.75 FIXED-SATELLITE (space-to-Earth) (Earth-to-space).	839 844 846 12.7-12.75 FIXED. FIXED-SATELLITE	12.5-12.75 FIXED. FIXED-SATELLITE (space-to-Earth). MOBILE except

	(Earth-to-space).	aeronautical mobile.
	MOBILE except aeronautical mobile.	BROADCASTING-SATELLITE. 847
848 849 850		
12.75-13.25	FIXED. FIXED-SATELLITE (Earth-to-space). MOBILE. Space Research (deep space) (space-to-Earth). 792A	

* * * * *

United States table

Government	Non-Government
Allocation MHz (4)	Allocation MHz (5)
* * * * *	
4500-4800 FIXED. MOBILE. US245	4500-4800 FIXED-SATELLITE (space-to-Earth). 792A US245

* * * * *

6525-6875 809	6525-6875 FIXED. FIXED-SATELLITE (Earth-to-space). 792A 809
6875-7075 809	6875-7075 FIXED. FIXED-SATELLITE (Earth-to-space). MOBILE. 792A 809 NG118

* * * * *

Government	Non-Government
Allocation GHz (4)	Allocation GHz (5)

* * * * *

10.7-11.7 US211	10.7-11.7 FIXED. FIXED-SATELLITE (space-to-Earth). 792A US211 NG41 NG104
11.7-12.2	11.7-12.2 FIXED. FIXED-SATELLITE (space-to-Earth). 839 Mobile except aeronautical.

839	839 NG143 NG145
12.2-12.7	12.2-12.7 FIXED. MOBILE except aeronautical mobile. BROADCASTING. BROADCASTING- SATELLITE. 839
839 844	839 844 NG139
12.7-12.75	12.7-12.75 FIXED. FIXED-SATELLITE (Earth-to-space). MOBILE except aeronautical mobile. NG53 NG118
12.75-13.25	12.75-13.25 FIXED. FIXED-SATELLITE (Earth-to-space). MOBILE.
US251	792A US251 NG53 NG104 NG118
* * * * *	
31.0-31.3 Standard Frequency and Time Signal-Satellite (space-to-Earth).	31.0-31.3 FIXED. MOBILE. Standard Frequency and Time Signal-Satellite (space-to-Earth).
884 886 US211	886 US211

INTERNATIONAL FOOTNOTES

792A The use of the bands 4 500-4 800 MHz, 6 725-7 025 MHz, 10.7-10.95 GHz, 11.2-11.45 GHz and 12.75-13.25 GHz by the fixed-satellite service shall be in accordance with the provisions of Appendix *30B*.

* * * * *

836 In Region 2, in the band 11.7-12.2 GHz, transponders on space stations in the fixed-satellite service may be used additionally for transmissions in the broadcasting-satellite service, provided that such transmissions do not have a maximum e.i.r.p. greater than 53 dBW per television channel and do not cause greater interference or require more protection from interference that the coordinated fixed-satellite service frequency assignments. With respect to the space services, this band shall be used principally for the fixed-satellite service.

837 Different category of service: in Canada, Mexico and the United States, the allocation of the band 11.7-12.1 GHz to the fixed service is on a secondary basis (see No. *424*).

* * * * *

839 The use of the bands 11.7-12.2 GHz by the fixed-satellite service in Region 2 and 12.2-12.7 GHz by the broadcasting-satellite service in Region 2 is limited to national and subregional systems. The use of the band 11.7-12.2 GHz by the fixed-satellite service in Region 2 is subject to previous agreement between the administrations concerned and those having services, operating or planned to operate in accordance with the table, which may be affected (see Articles *11*, *13* and *14*). For the use of the band 12.2-12.7 GHz by the broadcasting-satellite service in Region 2, see Article *15*.

842 Additional allocation: the band 12.1 - 12.2 GHz in Brazil and Peru, is also allocated to the fixed service on a primary basis.

844 In Region 2, in the band 12.2-12.7 GHz, existing and future terrestrial radiocommunication services shall not cause harmful interference to the space services operating in conformity with the Broadcasting-Satellite Plan for Region 2 contained in Appendix *30* (*Orb - 85*).

* * * * *

846 In Region 2, in the band 12.2-12.7 GHz, assignments to stations of the broadcasting-satellite service in the Plan for Region 2 contained in Appendix *30* (*Orb - 85*) may also be used for transmissions in the fixed-satellite service (space-to-Earth), provided that such transmissions do not cause more interference or require more protection from interference than the broadcasting-satellite service transmissions operating in conformity with the Region 2 Plan. With respect to the space services, this band shall be used principally for the broadcasting-satellite service.

847 The broadcasting-satellite service in the band 12.5-12.75 GHz in Region 3 is limited to community reception with a power flux-density not exceeding -111 dB(W/m^2) as defined in Annex *5* of Appendix *30* (*Orb - 85*). *See* also Resolution *34*.

* * * * *

858 The band 14-14.5 GHz may be used, within the fixed-satellite service (Earth-to-space), for feeder links for the broadcasting-satellite service, subject to coordination with other networks in the fixed-satellite service. Such use of feeder links is reserved for countries outside Europe.

* * * * *

863 The use of the band 14.5-14.8 GHz by the fixed-satellite service (Earth-to-space) is limited to feeder links for the broadcasting-satellite service. This use is reserved for countries outside Europe.

* * * * *

868 Additional allocation: in Afghanistan, Algeria, the Federal Republic of Germany, Angola, Saudi Arabia, Austria, Bahrain, Bangladesh, Cameroon, Costa Rica, El Salvador, the United Arab Emirates, Finland, Guatemala, Honduras, India, Indonesia, the Islamic Republic of Iran, Iraq, Israel, Japan, Kuwait, Libya, Nepal, Nicaragua, Oman, Pakistan, Qatar, Sudan, Sri Lanka, Sweden, Thailand, and Yugoslavia, the band 17.3-17.7 GHz is also allocated to the fixed and mobile services on a secondary basis. The power limits given in Nos. *2505* and *2508* shall apply.

869 The use of the band 17.3-18.1 GHz by the fixed-satellite service (Earth-to-space) is limited to feeder links for the broadcasting-satellite service. For the use of the band 17.3-17.8 GHz in Region 2 by the feeder links for the broadcasting-satellite service in the band 12.2-12.7 GHz, see Article *15A*.

* * * * *

884 In the band 31-31.3 GHz the power flux-density limits specified in No. *2582* shall apply to the space research service.

* * * * *

II. Part 25 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 25 -- SATELLITE COMMUNICATIONS

1. The authority citation in Part 25 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 25.201 is amended by revising the definition for Fixed-Satellite Service to read as follows:

Section 25.201 Definitions.

* * * * *

Fixed-Fixed Satellite Service. A radiocommunication service between earth stations at given positions, when one or more satellites are used; the given position may be a specified fixed point or any fixed point within specified areas; in some cases this service includes satellite-to-satellite links, which may also be operated in the inter-satellite service; the fixed-satellite service may also include feeder links of other space radiocommunication services.(RR)

* * * * *

FOOTNOTES

[1] NTIA's *Manual of Regulations and Procedures for Federal Radio Frequency Management (Manual)* also contains a complete listing of international, Government, and non-Government frequency allocations, and the domestic and international footnotes that pertain to those allocations. In order to reflect the changes made to the international footnotes at Orb-88, NTIA has recommended to the Interdepartment Radio Advisory Board (IRAC) that appropriate revisions be made to the NTIA manual. IRAC is composed of representatives from the federal executive agencies and an FCC liaison representative. IRAC assists NTIA on spectrum management issues, and coordinates spectrum issues among government users and with the Commission. *See* 47 CFR 2.106 and Manual, Department of Commerce, NTIA, May 1989 edition.

[2] 5 U.S.C. Section 553(b)(B). This paragraph of Section 553 provides that the notice and comment requirements of that section do not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-487

In the Matter of

Amendment of Section 73.202(b), RM-6855
Table of Allotments,
FM Broadcast Stations.
(Randolph and Brandon, Vermont)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 20, 1991; Released: March 28, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 7958 (1989), issued in response to a petition filed by Stokes Communications Corporation (petitioner) proposing the substitution of Channel 271C3 for Channel 272A at Randolph, Vermont, and the modification of its license for Station WCVR-FM to specify operation on the higher powered channel. In order to accommodate the Randolph substitution, petitioner requests the substitution of Channel 268A for vacant but applied for Channel 270A at Brandon, Vermont,[1] and the imposition of a site restriction on Channel 267A at Essex, New York.[2] Petitioner filed supporting comments reiterating its interest in the upgrade. Bach 'n Roll Radio of Brandon, Inc. ("Bach") and the Mirkwood Group ("Mirkwood"), applicants for the Brandon channel, filed opposing comments. Petitioner filed reply comments.

SUMMARY OF COMMENTS

2. Bach opposes the petitioner's proposal on several grounds. First, Bach questions the adequacy of the area available to accommodate a Channel 268A facility at Brandon. It alleges that the petitioner has overstated the area in which a Channel 268A facility could locate. Bach asserts that when the proper separations between the Randolph and Brandon facilities are taken into account, the area within which the Brandon station could locate decreases to a small rectangle that is approximately 3 miles by 3/4 mile in size. Moreover, Bach alleges that even this rectangle is overstated in that the petitioner applied a 0.5 kilometer rounding increment in determining fully spaced areas. Furthermore, such a site location would not comply with Section 73.315's admonition that a licensee should place its antenna "in the most sparsely populated area available."

3. Second, Bach questions the suitability of this small area for purposes of locating an FM transmitter. It notes that the reference coordinates proposed by the petitioner and used by the Commission for Channel 268A at Brandon are located in a swamp, which would present difficulties in locating a transmitter. As a result, Bach believes that it would have to search for another site that is closer to Brandon than the rural area specified by Bach in its application for a new station on Channel 270A. However, since the area within which a non-short-spaced site could be located is also significantly lower than the site proposed by Bach, Bach contends this would require a tall tower of between 730 feet and 970 feet which would likely not be approved by zoning officials. Bach also believes that placing a new FM facility in such a populated area would subject residents in the area around the tower to blanketing interference which could be severe given the fact that Brandon residents receive the majority of their television and radio signals from distant communities and that such relatively weak signals are more susceptible to interference.

4. Third, Bach claims that, even if the requisite zoning approvals could be achieved, the station would be a subpar Class A facility because the station would be effectively precluded from increasing power to 6 kilowatts. This is because a station on Channel 268A would be significantly short-spaced under the new minimum distance separation rules to four stations in three different directions and close to a fifth station in another direction. Bach alleges that this situation would virtually lock the station into remaining a 3 kW station. By way of contrast, Bach notes that, if it were to operate on Channel 270A, which it applied for, it would only be a few kilometers short-spaced to two stations in the same direction, enabling it to become a 6 kW station by use of a moderate directionalization or an alternative site selection. [3]

5. Fourth, Bach asserts that the *Notice* in this proceeding failed to take into account an application (File No. BPH-890705MA) filed by Route Nine Broadcasting ("Route Nine") on July 5, 1989, for a new FM facility on Channel 268A at Marlboro, Vermont. Bach notes that Route Nine has specified a transmitter site that is approximately 7.9 kilometers northwest of the reference site for the Marlboro allotment. Bach contends that if this application were granted, it would eliminate the narrowly circumscribed area within which a Brandon station could operate. Moreover, since Route Nine filed the only application, Bach believes that the coordinates for the Marlboro application must be considered. Finally, Bach argues that, if the petitioner's upgrade proposal is granted, the Commission should require the petitioner to reimburse the Brandon applicants for the costs involved in relocating their sites. Bach specifically argues that petitioner should be required to reimburse it for the option payment it has made for its current site and any expenses in procuring a new site.

6. Mirkwood also opposes the substitution of Channel 268A for Channel 270A at Brandon because it believes that no fully spaced site exists for Channel 268A at Brandon. Like Bach, Mirkwood bases this argument on the ground that the *Notice* does not consider the transmitter site specified by Route Nine in its application for a new FM station at Marlboro, Vermont. Mirkwood asserts that when this factor is considered, it eliminates any separation that may have existed to Channel 268A at Brandon by over 7 kilometers.

7. In reply comments, petitioner disputes the arguments made by Bach and Mirkwood in their comments. First, petitioner contends that the substitution of Channel 268A for vacant but applied for Channel 270A can be made in compliance with the Commission's minimum distance separation requirements. Although petitioner concedes

that it did apply a 0.5 kilometer rounding increment, petitioner states that this is permitted by the Commission's Rules. Second, petitioner questions Bach and Mirkwood's assertions that the fully spaced area for the substitute channel at Brandon entirely disappears when one considers the Marlboro applicant. Petitioner recognizes that the Marlboro site is short-spaced to the Brandon reference point, but petitioner asserts that this does not mean that the Marlboro applicant must be protected to the detriment of the Commission's discretion in this rule making proceeding. This is because, according to petitioner, the site specified by the Marlboro applicant represents a mere preference for a site and is outweighed by the public interest benefits flowing from the upgrade of the Randolph station. Third, petitioner contends that there is ample fully spaced area to accommodate the Brandon applicants because the fully spaced area is at least 1.5 square miles (or 960 acres) whereas a 500-foot guyed broadcast tower requires no more than 12 acres of land.

8. Petitioner also addresses Bach's concerns about the Brandon allotment being relegated to a second-class status. Citing *Vero Beach, Florida*, 4 FCC Rcd 2184 (1989), petitioner contends that Channels 268A and 270A at Brandon are equivalent for allotment purposes because they are of the same class and have a fully spaced reference point close enough to the community to allow city-grade service. It further notes that the greater portion of the fully spaced area is not densely populated and the station's blanketing contour would not include many people. Moreover, with respect to zoning, petitioner argues that Bach has proffered mere hearsay to indicate that local zoning officials might not approve a tall tower. Petitioner contends that even in an application context, this is insufficient to rebut the presumption that local approval will be forthcoming and that in rule makings, the Commission has consistently rejected arguments going to zoning matters.

9. However, even if the Commission were to consider the effect of the upgrade of Station WCVR-FM at Randolph on the Brandon service area, petitioner contends that the public interest is best served by upgrading the Randolph station. In support of this argument, petitioner submitted an engineering study showing that grant of the upgrade at Randolph would increase Station WCVR's service population by 62,000 persons within its 1 mV/m contour. It then compared the population that could be served within the 1 mV/m contour by the facilities proposed in Bach's application for Channel 270A at Brandon (*i.e.*, 69,000 persons) with "assumed" facilites for Channel 268A at Brandon -- 5.8 kW effective radiated power and a 30-meter HAAT -- which could serve 29,000 persons, resulting in a potential loss of 40,000 persons. However, petitioner asserts that, overall, its proposal will result in a net gain in 1 mV/m coverage of 22,000 persons, which makes grant of its proposal in the public interest. Finally, petitioner contends that it is not obligated to reimburse affected applicants as compared to displaced permittees or licensees, citing, *Circleville, Ohio*, 8 FCC 2d 159 (1979) and *Casa Grande, Claypool and Kearney, Arizona*, 5 FCC Rcd 157 (1990).

DISCUSSION

10. After consideration of the comments and reply comments filed in this proceeding, we believe that the public interest would be served by substituting Channel 271C3 for Channel 272A at Randolph, Vermont, and modifying the license for Station WCVR-FM to specify the higher class channel because this will result in an expanded area FM service for Randolph. To accommodate this upgrade, we will substitute Channel 268A for Channel 270A at Brandon, Vermont, and permit the applicants for Channel 270A at Brandon to amend their applications and retain cut-off protection. As will be explained below, we believe that Bach and Mirkwood have not demonstrated sufficient reasons why Channel 268A should not be substituted for Channel 270A at Brandon.

11. To begin with, we believe that there is theoretical site availability to allot Channel 268A at Brandon.[4] Although the site for Channel 268A proposed in the *Notice*[5] has a modest site restriction of 2.5 kilometers (1.5 miles) east of Brandon, it is not short-spaced to the sites of authorized stations or to the reference coordinates for any vacant allotments.[6] Furthermore, a staff analysis of terrain profile reveals that this site would provide city-grade coverage to Brandon in compliance with Section 73.315 of the Commission's Rules. We do recognize, however, that when the required spacing of 41.5 kilometers between Channel 268A at Brandon and Channel 271C3 at Randolph is taken into account, the area available to locate a transmitter for Channel 268A at Brandon is reduced to a rectangular area of approximately 1.5 square miles (960 acres). While this appears to be a relatively small area, we believe that it is sufficient for purposes of locating a transmitter because, as stated by petitioner, a 500-foot guyed broadcast tower requires no more than 12 acres of land. Therefore, we believe that the record in this proceeding establishes that there is a theoretical site which is appropriate for allotment purposes.

12. We note, however, that Bach has challenged the suitability of this theoretical site. While such matters are generally considered at the application, as opposed to the allotment, stage,[7] we have examined the nature of the land available in the fully spaced area because it has been alleged that the area in question is small and contains a swamp. In this regard, we agree with Bach that the reference coordinates proposed by the petitioner and used in the *Notice* are in a swamp. Although petitioner's engineering exhibit states that "there is no technical reason that the swamp area could not be employed for the transmitter site," we do not have a factual record to support this proposition. On the contrary, we have, consistent with our approach in similar situations,[8] confirmed that another site 0.6 kilometers (0.4 miles) south of Brandon is available on dry land that meets the spacing requirements.[9] We have also performed a terrain profile study and confirmed that this site would provide city-grade coverage to Brandon.[10] While Bach contends that it may not be able to obtain zoning approval for an FM tower within the fully spaced area, we believe that this argument is speculative. There is no documentation from zoning officials to support this assertion. Moreover, "[a]bsent a sufficiently compelling showing demonstrating that no sites complying with the Commission's minimum distance separation and other technical requirements exist, the Commission's concerns at the rule making stage do not generally require detailed showings concerning the

availability and suitability of a specific transmitter site. Rather, we require a showing demonstrating only that such an area does exist." *Key West, Florida*, 3 FCC Rcd 6423 (1988). In this case, we know that a fully spaced area exists to locate a transmitter site, and Bach has not shown that zoning problems would prevent locating an FM tower anywhere within this area. Likewise, Bach's arguments regarding blanketing interference are speculative and, consistent with past precedent, are more appropriately considered at the application stage. *See Key West, Florida, supra*, and *Kirksville, Missouri*, 3 FCC Rcd 3629 (1988).

13. We also reject Bach and Mirkwood's contention that the transmitter site proposed by Route Nine in its application for Channel 268A at Marlboro, Vermont, is an impediment to alloting Channel 268A at Brandon. While Route Nine may be the only applicant for the channel, it is still an "applicant" and not a "permittee" or a "licensee". Consequently, its proposal merely represents a siting preference which is not binding on the Commission. *See Dunn, Fuquay - Varina, Hope Mills, Topsail Beach, and Williamston, N.C.*, 4 FCC Rcd 2301 (1989). We will, therefore, send a copy of this *Report and Order* to Route Nine and require Route Nine to amend its application to specify a different transmitter site.

14. Furthermore, contrary to Bach's assertions, we believe that Channel 268A is equivalent to Channel 270A at Brandon for allotment purposes. While we recognize that no two channels are ever entirely identical, we consider channels to be equivalent if they are of the same class, would comply with the minimum distance separation requirements, and would enable a station to provide city-grade coverage to the community where the allotment would be made. *See Vero Beach, Florida*, 3 FCC Rcd 1049, (1988), *rev. denied*, 4 FCC Rcd 2184, 2185 (1989). In addition, we indicated in *Vero Beach* that we would consider other relevant factors which might undermine a finding of channel equivalency. These factors could include environmental consequences or air hazards which would prevent a station from being constructed on that channel. Although Bach has argued that local officials are unlikely to approve construction of a tower that would permit operation of a station on Channel 268A at 100 meters HAAT, the maximum for Class A channels, and that this would relegate the station to second-class status, we do not believe that Bach has made a sufficient showing in this regard. As we stated above, there has been no evidence presented from zoning officials that a station cannot be constructed on Channel 268A somewhere within the fully spaced area that would enable operation with effective radiated power of 3 kW and HAAT of 100 meters. Moreover, even if the station could not achieve a HAAT of 100 meters, we are not convinced that such a shortcoming could not be rectified by increasing the station's power to achieve a theoretical equivalence with a station operating at 3 kW and HAAT of 100 meters. The derivation and use of the predicted signal contour curves indicate that such compensation is possible. Furthermore, Bach's allegation that increased power would result in multipath interference is incorrect. Multipath interference is a function of signal ratios, not absolute signal levels.[11]

15. Likewise, Bach's argument that a station operating on Channel 268A would not be able to achieve an effective radiated power of 6kW, as recently permitted for Class A channels, does not undermine our conclusion that Channels 268A and 270A are equivalent for allotment purposes. This is because the *Second Report and Order* in Docket 88-375 expressly stated that rule making petitions filed prior to October 2, 1989, would be processed in accordance with the rules then in effect. Since the petition seeking the upgrade at Randolph and the related substitution at Brandon was filed on June 1, 1989, it is entitled to be processed under the pre-October 2, 1989, rules. Moreover, Bach has not shown that the gain in population to be served as a 6kW station on Channel 270A at Brandon is greater than the gain in population that could be served by upgrading Station WCVR-FM at Randolph to a Class C3 channel.

16. Finally, in response to the reimbursement issue raised by Bach, there is no Commission policy of reimbursement with respect to applicants for a channel allotment. Only licensees and permittees are entitled to reimbursement. *See, e.g., Gleneden Beach, Sweet Home and Toledo, Oregon*, 4 FCC Rcd 7796 (1989). Therefore, petitioner is not responsible for reimbursing the Brandon applicants.

17. In summary, Channel 271C3 can be allotted to Randolph in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.1 kilometers northeast to avoid a short-spacing to Station WAQY, Channel 271B at Springfield, Massachusetts.[12] Channel 268A can be allotted to Brandon in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.6 kilometers south of Brandon to avoid a short-spacing to vacant but applied for Channel 268A in Marlboro, Vermont, and to the newly assigned Channel 271C3 in Randolph.[13] Canadian concurrence has been received since Randolph and Brandon are located within 320 kilometers (200 miles) of the U.S.-Canadian border.[14]

18. We shall also modify the license of Station WCVR-FM to specify operation on Channel 271C3 in accordance with Section 1.420(g) of the Commission's Rules. The applicants for Channel 270A at Brandon will be permitted to amend their applications to specify operation on Channel 268A. They will retain cut-off protection since the channels are of an equivalent class. *See Phillipsburg, Kansas*, 48 FR 10844 (1983).

19. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 13, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Brandon, Vermont	268A
Randolph, Vermont	271C3

20. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Stokes Communications Corporation for Station WCVR-FM, Randolph, Vermont, IS MODIFIED to specify operation on Channel 271C3 in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

21. IT IS FURTHER ORDERED, That the applicants for Channel 270A at Brandon amend their pending applications to specify Channel 268A and, if necessary, to specify non-conflicting transmitter sites. Route Nine Broadcasting, the applicant for Channel 268A, Marlboro, Vermont, and Roy D. Edmonds, an applicant for Channel 267A, Essex, New York, will be required to amend their applications to specify non-conflicting sites to Channel 268A at Brandon.

22. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 270A at Brandon, Vermont, the the applicant for Channel 268A at Marlboro, Vermont, and one of the applicants for Channel 267A at Essex, New York, as follows:

Carole L. Pickett
1 North Park Place
Fairhaven, VT 05743

Bruce M. Lyons
314 Ivy PL 100 Wolf Road
Lebanon, NH 03766

Lewis Creek Broadcasters, Inc.
Lewis Creek Road
Charlotte, VT 05445

Paul A. Zevnik, Esq.
Kaye, Scholer, Fierman, Hays & Handler
901-15th Street, N.W.
Washington, D.C. 20005
(Counsel for Lewis Creek Broadcasters)

The Mirkwood Group
21 Franklin Street
Brandon, VT 05733

Bach 'n Roll Radio of Brandon, Inc.
5211 Wehawken Road
Bethesda, MD 20816

James G. Kirkpatrick
Box 369
Brookfield, VT 05036

Green Mountain Boys Broadcasting, Inc.
4907 Rutland Place
Alexandria, VA 22304

Route Nine Broadcasting
Marlboro Rd. P.O. Box 2108
W. Brattleboro, VT 05301
(Applicant for Channel 268A, Marlboro, VT)

Roy D. Edmonds
R.D. #1, Box 235
Plattsburgh, New York 12901
(Applicant for Channel 267A, Essex, NY)

23. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

24. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] There are seven applications pending for the use of Channel 270A at Brandon, Vermont. The applicants are Carole L. Pickett (BPH-890413MO), Bruce M. Lyons (BPH-890413MD), Lewis Creek Broadcasters, Inc. (BPH-890413NA), The Mirkwood Group (BPH-890412MH), Bach 'n Roll Radio of Brandon, Inc. (BPH-890413NG), James G. Kirkpatrick (BPH-890413NI), and Green Mountain Boys Broadcasting, Inc. (BPH-890413NM). These applications were recently designated for a comparative hearing but the award of any construction permit was made contingent upon the outcome of the instant rule making proceeding. *See Hearing Designation Order* in MM Docket No. 90-636, released January 28, 1991, DA 90-1922.

[2] The Commission allotted Channel 267A to Essex, New York, with a 2.9 kilometer (1.8 mile) site restriction in order to protect this proposal. *See* 4 FCC Rcd 5775 (1989).

[3] Bach also contends that a 3 kW station on Channel 268A at Brandon would be a sub-par Class A facility because, given difficulties in obtaining approval for a tall tower, it may be unable to operate as a full-height (*i.e.*, 100 meters), 3 kW facility. While Bach acknowlegdes that it could operate at a power level in excess of 3 kW in order to achieve a theoretical equivalence with a 3 kW/100 meter facility, Bach contends that such a solution would have practical problems because this "would not extend the horizon . . . but merely create a higher

powered signal." Bach also alleges that the use of higher power would increase the likelihood of multipath interference, especially given the rugged terrain around Brandon.

[4] In rule making proceedings to allot FM channels, "the question as to the availability and suitability of an antenna site in a marginal situation is important only to the extent of whether, if a channel were to be assigned, there is a reasonable assurance that a station would be able to provide adequate service to the community. The question of whether a specific site is legally available and suitable is a matter to be more appropriately considered in connection with an application for a construction permit for the use of a channel." *Pinckneyville, Illinois*, 30 R.R. 2d 1344, 1347 (1974). In other words, there must be a theoretical site which meets the Commission's various technical rules. *See, e.g., Key West, Florida*, 3 FCC Rcd 6423 (1988).

[5] The coordinates proposed in the *Notice* for Channel 268A at Brandon are 43-47-42 and 73-03-40.

[6] Although Bach questions the use of a 0.5 kilometer rounding increment in determining the required spacings, this is permitted under Section 73.208(c)(8) of the Commission's Rules.

[7] *See Pinckneyville, Illinois, supra* n.4.

[8] *See, e.g., Rockport, Gregory, Alice, and Armstrong, Texas*, 4 FCC Rcd 8075, 8076 (1989).

[9] The coordinates for this dry site for Channel 268A at Brandon are 43-47-36 and 73-05-25. We note that this site is 1.6 kilometers short-spaced to one of five applications (File No. BPH-891012MP) at coordinates 44-18-16 and 73-24-48 for Channel 267A at Essex, New York, filed by Roy D. Edmonds ("Edmonds"). However, as indicated in para. 13 *infra*, Edmonds proposal represents a site preference which is not binding upon the Commission. Because other sites are available, Edmonds will be sent a copy of this *Report and Order* and will be required to amend his application to specify a non-conflicting site without loss of cut-off protection.

[10] Although Bach contends that a transmitter site located closer to Brandon than the site specified in its application for Channel 270A would not comply with Section 73.315's admonition that a licensee should place its antenna in the most sparsely populated area available, we note that the site selection language of this section is suggestive and not mandatory. *See, e.g., Harden Broadcasting Corp.*, 36 R.R. 2d 1274 (1976); *see also Jesse Willard Shirley*, 24 R.R. 2d 982 (1972).

[11] We note that there is another channel available for substitution at Brandon under the spacing rules in effect at the time the petition for the Randolph upgrade was filed. Specifically, Channel 229A can be alloted with a site restriction of 9.3 kilometers northwest of Brandon. The coordinates for this channel are 43-50-01 and 73-11-47. However, in the absence of a request for this channel at Brandon and in view of the need to coordinate that channel with Canada, we have not given further consideration to allotting Channel 229A to Brandon.

[12] The coordinates for Channel 271C3 at Randolph are North Latitude 43-59-30 and West Latitude 72-36-18.

[13] The new coordinates for Channel 268A at Brandon are 43-47-36 and 73-05-25. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the applicants at Brandon may avail themselves of the provisions of Section 73.213(c)(1) with respect to Station WCVM(FM), Channel 265A, Middleburg, Vermont, Station WENU(FM), Channel 269A, Hudson Falls, New York, the vacant but applied for Channel 268A, Marlboro, Vermont, and the vacant but applied for Channel 267A, Essex, New York.

[14] Canadian concurrence for Channel 268A at Brandon is based on facilities of 3kW and 100 meters.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NELSON BROADCASTING CORPORATION (WIOI-FM) Brunswick, Georgia	File Nos. BPFTB-890619TA and BLFTB-891004TA

For Authority to Construct An FM Booster In Jacksonville, FL And for a License to Cover Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1991; Released: March 29, 1991

By the Commission:

1. Under consideration before the Commission are an application for review, filed by Nelson Broadcasting Corporation ("Nelson") licensee of WIOI-FM, Brunswick, Georgia,[1] of the Mass Media Bureau's ("Bureau") March 6, 1990, action (Letter from Larry D. Eads, Chief, Audio Services Division, reference 8930-CFD) rescinding the staff's August 30, 1989 grant of a construction permit for FM booster station WIOI-FM1, and all related pleadings.[2] For the reasons set forth below, we grant the application for review.

2. The Bureau's March 6 letter held, *inter alia*, that a grant of the booster construction permit is precluded by Section 73.207 of our FM Rules because the booster station would be less than the intermediate frequency ("IF") separation requirement of 24 kilometers from WJCT-FM, Jacksonville, Florida, a station which operates on channel 210 and is 54 channels away from Nelson's channel 264. As support for its action, the Bureau relied upon a statement in the *Report and Order* in MM Docket No. 87-13, *Amendment of Part 74 of the Commission's Rules Concerning FM Booster Stations and Television Stations*, 2 FCC Rcd 4625 (1987) (" *R & O* "), indicating that the geographic separation between a booster station and a station 54 channels away will be that provided in Section 73.207. *Id.* at 4630. In its application for review, Nelson contends that this spacing requirement cannot be applied to its booster because, contrary to Section 552(a) of the Administrative Procedure Act, the requirement was never published in the Federal Register and Nelson never received actual notice of it.

3. Section 552(a)(1)(C) of the Administrative Procedure Act, 5 U.S.C. § 552 (a)(1)(C), requires that the Commission "separately state and publish in the Federal Register...substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretation of general applicability formulated and adopted by the agency." Section 552(a) also provides: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to or be adversely affected by, a matter required to be published in the Federal Register and not so published." *See also Appalachian Power Co. v. Train*, 556 F.2d 451, 455 (4th Cir. 1977) (an agency "regulation imposing specific obligations upon outside interests in mandatory terms. . . is required to be published in the Federal Register in its entirety, or in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register.").

4. Although the Commission amended the part 74 booster station rules in other respects in the *R&O*, we did not include any rule provision requiring a specific mileage separation between stations operating 54 channels apart, nor did we add to the booster rules any cross-reference to Section 73.207. A summary of the *R&O* was printed in the Federal Register, but it did not contain specific reference to the IF spacing requirements of Section 73.207 of the Rules. The summary refers to contour-related protection to first, second and third adjacent channels, but does not discuss either contour protection or mileage separation to stations 54 channels away. 52 Fed. Reg. 31398 (August 20, 1987). [3] There is no suggestion that Nelson had actual notice of this requirement. Because the Commission failed to comply with the publication requirements of Section 552(a) the Administrative Procedure Act, under the circumstances of this case, its IF spacing requirements for booster stations are presently ineffective to impose obligations upon, or to adversely affect, Nelson, and the Bureau's action must be reversed.[4]

5. Accordingly, IT IS ORDERED that the application for review filed by Nelson Broadcasting Corporation on March 13, 199O IS GRANTED and the captioned applications (BPFTB-890619TA and BLFTB-891004TA) ARE GRANTED.

6. IT IS FURTHER ORDERED: (a) that the motion for stay filed by Nelson Broadcasting Corporation on March 13, 1990 IS DISMISSED as moot; (b) that the contingent request for waiver of Section 73.207 of the Rules filed by Nelson Broadcasting Corporation as part of its application for review IS DISMISSED as moot (c) that the motion to strike the March 27, 1990 supplement of Nelson Broadcasting Corporation to its application for review, filed by Metroplex Communications, Inc. on April 5, 1990, IS DENIED; and (d) that the request to expedite filed by Metroplex Communications, Inc. on March 28, 1990 IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On April 2, 1990, the WIOI call sign was changed to WAZO. However, for purposes of convenience and consistency with the pleadings filed, we will continue to refer to this station and the subject booster station by the call signs WIOI-FM and WIOI-FM1, respectively.

[2] Pleadings opposing Nelson's application for review have been filed by J.J. Taylor Companies, Inc., licensee of WIVY-FM, Jacksonville, Florida; Evergreen Media Corporation of Jacksonville, licensee of WAPE-FM, Jacksonville, Florida; and Metroplex Communications, Inc., licensee of WFYV-FM, Atlantic Beach, Florida. On March 27, 1990, Nelson supplemented its application for review. On April 5, 1990, Metroplex filed a motion to strike the supplement. Section 1.115(d) of the Rules contemplates and permits supplements to applications for review which are filed within 30 days of the date of the public notice of the subject action. Public notice of the Bureau's March 6 action was given on March 14, 1990. Nelson's supplement is therefore timely and Metroplex's motion to strike will accordingly be denied.

[3] The Bureau's March 6 letter rescinded Nelson's construction permit on the grounds that the staff's failure to enforce the booster spacing requirement was "inadvertent error," and that "an agency's failure to follow its own regulations is fatal to the deviant action" (citing *American Trucking Association v. Frisco Co.*, 358 U.S. 133, 144 (1958); *Interstate Broadcasting Company, Inc.*, 2 FCC Rcd 4051 (1987); and *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356 (D.C. Cir. 1979)). These cases, however, did not involve defective agency notice and are therefore not applicable to this case. Likewise, Metroplex cites *Udall v. Tallman*, 380 U.S. 1, 16 (1965), for the proposition that an agency has broad powers to interpret its rules, and implies that the Commission has discretion to determine whether Nelson had adequate notice. As stated above, the Commission believes that, under the circumstances of this case, the notice requirements of the Administrative Procedure Act have not been satisfied.

[4] In view of the foregoing, we need not reach the remaining issues raised by Nelson.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GRAPHNET, INC. File No. I-T-C-90-175

Application for authority to establish channels of communication between the U.S. and INTELSAT satellites for the provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: March 21, 1991; Released: March 29, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by Graphnet, Inc., requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of INTELSAT Business Services (IBS) and related digital video services. The application was placed on public notice on September 12, 1990. No comments were received. Upon consideration of the application, we find that the public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-175 IS GRANTED and Graphnet is authorized to establish channels of communications between the U.S. and INTELSAT AOR and POR satellites for the provision of IBS and related digital video services between the U.S. and overseas points listed in Comsat's Tariff F.C.C. No. 103 for the space segment component of IBS and related digital video services.[1]

3. Nothing in this order shall be construed as granting authority to construct any earth station facilities. A separate application pursuant to Title III of the Communication Act is required for such construction.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between Graphnet and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] Graphnet states that it will provide service using international earth stations that are currently authorized or may be authorized in the future to provide IBS service to points listed in Comsat's tariff.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH CO. AND AT&T OF PUERTO RICO, INC.

File No. I-T-C-91-034

Application for authority to convey, acquire, and activate facilities in the Transcaribbean Cable System and to provide service between Puerto Rico and Colombia.

ORDER AND AUTHORIZATION

Adopted: March 22, 1991; Released: March 29, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by American Telephone and Telegraph Co. (AT&T) and AT&T of Puerto Rico, Inc. (AT&T-PR), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to convey, acquire, and activate facilities in The Transcaribbean Cable System (TCS-1) for service between Puerto Rico and Colombia. The application was placed on public notice on November 28, 1990. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-034 IS GRANTED, and:

a. AT&T is authorized to convey to AT&T-PR, on an Indefeasible Right of User (IRU) basis, a one-half interest in 18 64-Kbps circuits AT&T wholly-owned in subsegments G-1 (Puerto Rico-Branching Repeater) and G-4 (Branching Repeater-Colombia) of the TCS-1 Cable;

b. AT&T-PR is authorized to:

1. acquire, on an IRU basis, from AT&T and activate the facilities in (a) above for service between Puerto Rico and Colombia;

2. deactivate 12 voice-grade circuits between Puerto Rico and Colombia in the St. Thomas-Puerto Rico Microwave Radio System and St. Thomas-Venezuela II Cable, and to transfer traffic from these circuits as well as the authorization for additional six circuits in the St. Thomas-Puerto Rico Microwave Radio System and St. Thomas-Venezuela II Cable not yet activated to the facilities in (a) above; and

3. use the facilities authorized herein to provide AT&T-PR's regularly authorized services between Puerto Rico and Colombia and beyond.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONESIAN TELECOMMUNICATIONS CORP. File No. I-T-C-91-037

Application for authority to establish international packet switching service between the Commonwealth of the Northern Mariana Islands and various overseas points

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 22, 1991; Released: March 29, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by Micronesian Telecommunications Corp. (MTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish international packet switching service between the Commonwealth of the Northern Mariana Islands (CNMI), on the one hand, and Australia, Singapore, Taiwan and American Samoa, on the other hand.[1] No additional facilities or equipment are needed to provide this service. The application was placed on public notice on December 5, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international packet switching service between CNMI and Australia, Singapore, Taiwan and American Samoa by MTC.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-037 IS GRANTED, and MTC is authorized to use previously authorized facilities to provide international packet switching service between CNMI, on the one hand, and Australia, Singapore, Taiwan and American Samoa, on the other hand.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MTC and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTE

[1] MTC describes its international packet switching service as an inter networking service furnished for the switching and transmission of data packets at transmission speeds up to 9.6 Kbps between CNMI and overseas locations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-91-039

Application for authority to acquire and operate facilities for direct service between the U.S. and Indonesia.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 22, 1991; Released: March 29, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed by US Sprint Communications Company Limited Partnership (US Sprint), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between the U.S. and Indonesia. The application was placed on public notice on December 12, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Indonesia by US Sprint.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-039 IS GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 54 voice-grade satellite circuits between the San Ramon, California earth station and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Indonesia furnished by US Sprint's correspondent in Indonesia (P.T. Indosat); and

b. use the facilities in (a) above to provide US Sprint's regularly authorized services, including switched voice services, between the U.S. and Indonesia and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in Indonesia. A copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTINGHOUSE COMMUNICATION SERVICES, INC. File No. I-T-C-90-165

Application for authority to acquire and operate facilities for direct service between the U.S. and the Dominican Republic.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 22, 1991; Released: March 29, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 16, 1990 and supplemented on December 17, 1990 and February 13, 1991, by Westinghouse Communication Services, Inc. (WCS), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities in the Transcaribbean Cable System (TCS-1) for direct service between the U.S. and the Dominican Republic. The application was placed on public notice on August 22, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to the Dominican Republic by WCS.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-165 IS GRANTED, and WCS is authorized to:

a. lease from MCI and operate 24 56-Kbps circuits (one T-1 circuit) in the TCS-1 cable between West Palm Beach, Florida and San Juan, Puerto Rico;

b. acquire from AT&T, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate 24 Minimum Assignable Units of Ownership (MAUOs) in the TCS-1 cable between San Juan, Puerto Rico and the Dominican Republic;

c. lease and operate necessary connecting facilities in the U.S.; and

d. use said facilities to provide WCS' regularly authorized services, including switched voice service, between the U.S. and the Dominican Republic and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between WCS and its correspondent in the Dominican Republic and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

6. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PALM BAY PUBLIC RADIO, INC.
Palm Bay, Florida

File No. BPED-841113MA

For Construction Permit for
a New Noncommercial Educational
FM Station on Channel 212A in
Palm Bay, Florida

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1991; Released: March 29, 1991

By the Commission:

1. The Commission has before it an application by Palm Bay Public Radio, Inc. ("Palm Bay") for a new noncommercial educational FM station in Palm Bay, Florida; a petition to deny filed by The Florida Institute of Technology ("FIT"); an opposition by Palm Bay and a reply by FIT.

2. By way of background, on August 17, 1984, Central Florida Educational Network ("Central") filed an application for a new noncommercial educational FM station on Channel 212A at Melbourne, Florida (File No. BPED-840817IA). On October 12, 1984, Central's application was placed on a *Public Notice* (Report No. A-91) which announced an established "A" cut-off date of November 14, 1984 for the filing of applications mutually exclusive with the Central application.[1] In response to the "A" cut-off date, Palm Bay filed the captioned application on November 13, 1984. Subsequently, Central's application was dismissed by letter of the Chief, FM Branch, dated March 20, 1986.[2] Despite the dismissal of Central's application, the Palm Bay application should have subsequently been placed on a "B" cut-off list pursuant to 47 C.F.R. § 73.3573(d). However, the staff inadvertently placed Palm Bay's application on a second "A" cut-off list (Report No. A-119), which established October 23, 1986 as the cut-off date for, and erroneously solicited the filing of, applications that were mutually exclusive with Palm Bay's application. On October 23, 1986, FIT filed its application in response to the "A" cut-off list on which Palm Bay's application had been erroneously placed. On January 16, 1987, the Chief, FM Branch, returned FIT's application as untimely, pursuant to the policy stated in *Kittyhawk Broadcasting Corp. et al.*, 7 FCC 2d 153 (1967). In *Kittyhawk*, the Commission held that in order for an application to be considered timely filed for purposes of the cut-off rule, a proposal must be timely filed with the lead application of a group of conflicting applications. FIT's application was returned as inadvertently accepted for filing as the application was filed well beyond Central's initially specified "A" cut-off date of November 14, 1984 and, therefore, was not entitled to comparative consideration. On February 13, 1987, FIT filed an application for review of this action. In *Florida Institute of Technology, Inc.*, 4 FCC Rcd 1549 (1989), the Commission denied FIT's application for review.[3]

3. On September 27, 1985, Palm Bay amended its application to comply with the TV Channel 6 interference provisions adopted in the *Memorandum Opinion and Order*. This amendment appeared on a *Public Notice* issued October 11, 1985 (Report No. 13481). Subsequently, on February 28, 1989, Palm Bay's amended application was placed on a "B" cut-off list (Report B-106) with a petition to deny cut-off date of April 4, 1989. On April 4, 1989, FIT filed the instant petition to deny.

4. Initially, FIT had alleged in its petition, *inter alia*, that Palm Bay's proposed facilities would cause objectionable interference to the reception of television Channel 6, WCPX(TV), Orlando Florida. In its opposition, however, Palm Bay calls attention to its September 27, 1985 amendment (BPED-850927MW) filed pursuant to the Commission's directive in paragraph 54 of the *Memorandum Opinion and Order*. This amendment reduced Palm Bay's proposed operation from 655 watts ERP at 78 meters HAAT to 100 watts ERP at 31 meters and thus brought its application into compliance with the new TV Channel 6 interference rules. For the first time, in its reply, FIT notes that the amendment would result in a greater than 50% change in Palm Bay's proposed service area and would therefore constitute a major change pursuant to 47 C.F.R. § 73.3573(a)(1).[4] FIT contends that once an application is amended so as to effect a major change, 47 C.F.R. § 73.3573(b) clearly describes the procedures to be followed.[5]

5. Under the Commission's processing rules, 47 C.F.R. § 73.3573, a major change amendment affects the filing status of the application which it amends. It requires the assignment of a new file number, return to the beginning of the processing line and, in the case of applications for new noncommercial educational FM stations, the placement of the amended application on a new "A" cut-off list subject to competing applications. FIT contends that the Commission therefore should have either dismissed Palm Bay's amended application as untimely with respect to Central's "A" cut-off date, or assigned a new file number to Palm Bay's application keyed to the major change amendment date, and acknowledged the erroneous second "A" cut-off date set by Report No. A-119 as a valid cut-off date for the amended Palm Bay application. In either event, FIT asserts, the September 27, 1985 amendment voided Palm Bay's protective cut-off status and FIT's application should therefore be reinstated.

6. In paragraph 54 of the *Memorandum Opinion and Order* in Docket 20735, the Commission modified its cut-off rules with respect to pending applications:

> Pending applications for construction permits for new stations or modifications of existing stations have until October 1, 1985, to amend their application to comply with the new rules adopted herein or provide a showing that the existing application is in compliance. After this date, all applications that are not in compliance or have not responded may be returned. . . . *Applications will not be returned to the beginning of the processing line due to the filing of these amendments.* (Emphasis added)

50 Fed. Reg. at 27960. By indicating that such applications would not be returned to the beginning of the processing line, and therefore would not be reprocessed as new applications subject to competing applicants pursuant to an "A" cut-off list, the Commission simply modified its cut-off rules for this class of applicants. It is well within our authority to adopt such a modification of our cut-off rules by Rule Making. *See* 47 U.S.C. § 154(i), 154(j), 303(r). Indeed, not to have done so here would have been to penalize applicants for making amendments required by the Commission.[6]

7. FIT contends that Section 309 of the Communications Act prohibits application of paragraph 54 of the *Memorandum Opinion and Order* in the present case. In support, FIT cites *Northern Television, Inc.*, 53 FCC 2d 320 (1975).[7] That case, however, simply indicates that Section 309(b) requires public notice and a 30-day waiting period to permit petitions to deny before action on certain applications. It does not state that Section 309(b) requires the acceptance of competing applications. Indeed, as is apparent from the face of Section 309, the purpose of the 30-day public notice period is to permit petitions to deny, not necessarily competing applications. As the U.S. Court of Appeals for the District of Columbia Circuit recently stated (in another context) in *National Association for Better Broadcasting v. F.C.C.*, 849 F.2d 665 (D.C. Cir. 1988):

> . . . § 309 requires the Commission upon the filing of an application for "any substantial amendment" of a license, 47 U.S.C. § 309(b), to determine "whether the public interest, convenience and necessity will be served" by allowing the application. 47 U.S.C. § 309(a) (1962 & Supp. 1987). In the process of that determination, public notice must be given, 47 U.S.C. § 309(b); 47 C.F.R. § 73.3580. Interested parties may file petitions for denial of such applications, 47 U.S.C. § 309(d); 47 C.F.R. § 73.3584. The Commission must hold hearings where appropriate. 47 U.S.C. § 309(e); 47 C.F.R. § 73.3593.

849 F.2d at 670. In the instant case, because the amendment was a "major" amendment under the Commission's rules, the Commission complied with Section 309(b) by issuing a public notice establishing a "B" cut-off date for petitions to deny. We are aware of no court or Commission decisions holding that the Commission was also required to establish a new cut-off date for the filing of additional competing applications despite its decision in the Docket 20735 Rule Making not to do so.

8. In its petition to deny, FIT also contends that the Palm Bay application is fatally defective in several respects, thus rendering it unacceptable for filing. In essence, FIT contends that (a) Palm Bay fails to establish its eligibility to operate as a noncommercial licensee as required by 47 C.F.R. § 73.503; (b) the applicant's proposed weekly programming schedule fails to meet the minimum operating requirements as set forth in 47 C.F.R. § 73.561; (c) Palm Bay's Issues/Program exhibit does not reflect the significant needs and problems of the community; and (d) Palm Bay failed to comply with the Commission's reporting rule, 47 C.F.R. § 1.65.

9. Section 309(d)(1) of the Communications Act requires a two-step analysis for judging the sufficiency of FIT's petition. We must first determine whether the petition and its supporting affidavits contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. 47 U.S.C. § 309(d)(1). The *prima facie* sufficiency determination assumes that the specific facts set forth by the complaining party are true without reference to contrary evidence, and we are limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). Allegations within these documents that consist "of ultimate, conclusionary facts or more general allegations on information and belief, supported by general affidavits. . . are not sufficient." *Gencom, Inc. v. FCC*, 832 F.2d 171, n.11 (D.C. Cir. 1987). If we determine that the petition satisfies the threshold standard, the inquiry proceeds to a second phase. Having found that the petitioner has alleged a *prima facie* inconsistency with the public interest, the Commission must then determine whether, on the basis of the application, the pleadings filed, or other matters which it may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). Should the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. § 309(e). *See* 47 U.S.C. § 309(d)(2).

10. We find no basis to designate the application for hearing on any of these issues. Following Commission action in *Moody Bible Institute*, 66 FCC 2d 162 (1977), the staff formulated processing standards for use in analyzing applicants for the educationally reserved FM frequencies. These processing standards were later published as Appendix A to the *Notice of Inquiry* in Docket 78-164, 43 Fed. Reg. 30842 (1978). The standards state that an applicant for a noncommercial, educational FM license may qualify as either an educational institution or as an educational organization -- the standards for qualification as an organization requiring additional information from the applicant. Organizational applicants must demonstrate that they have an educational goal and are committed to the advancement of an educational program. In evaluating compliance with these standards, emphasis is given to those programs that are instructional (for credit) and general educational (no formal credit).

11. Palm Bay has applied for its proposed facility as an educational organization. FIT has questioned Palm Bay's qualifications based on the insufficiency of its programming proposal and the lack of a definitive goal or purpose specified within the application. However, the processing standards do not dictate the specific goals required of an organizational applicant. The Commission has routinely granted construction permits to applicants for educational radio stations whose stated purpose was to develop educational programming for their community of license. *See e.g.* construction permits issued to KBUT(FM) Crested Butte, Colorado (BPED-841105IB, granted December 13, 1985), and to WNZN(FM), Lorain, Ohio (BPED-881215MJ, granted March 2, 1990). Hence, Palm Bay's statement that it will ascertain and develop educational programming for its community of license is an acceptable and consistent manifestation of its educational goal. Indicative of its commitment to an educational program, Palm Bay has stated that it will create programming to

educate and to develop local performing artists and to educate its listeners with respect to veterans' benefits and procedures.

12. FIT also asserts that Exhibit 5, the weekly program schedule provided by Palm Bay, is not illustrative of an educational purpose and that the limited amount of programming shown in the application, 10.75 hours, fails to meet the minimum operating schedule for a noncommercial, educational FM station as set forth in 47 C.F.R. § 73.561. FIT further asserts that Exhibit 6, the Issues/Programs Statement, does not reflect the significant needs and problems of Palm Bay.

13. In opposition, Palm Bay states that its application did not show programming for every minute of its operating schedule but, rather, presented an illustrative program list. As Palm Bay asserts that it will provide educational programming and programming responding to the needs and interests of Palm Bay community, we find that the pleadings do not raise a substantial and material question of fact that Palm Bay is ineligible to operate a noncommercial station, would operate in violation of the provisions of 47 C.F.R. § 73.561, or will not provide issue-responsive programming. Moreover, on June 27, 1984, the Commission adopted the *Report and Order* in BC Docket 81-496, 98 FCC 2d 746 (1984) which eliminated the requirement for educational licensees to conduct a formal ascertainment and afforded licensees wide discretion to determine how community needs should be ascertained and met. The rule changes enunciated in the *Report and Order* in BC Docket 81-496, were reflected in a December 1985 revised application form for noncommercial educational FM broadcast stations (FCC Form 340). The requirement to provide a list of proposed weekly programming was eliminated from Form 340 and replaced with a requirement to provide a statement of proposed programming policies. Palm Bay's application was filed on a January 1983 edition of FCC Form 340; therefore it would be unfair to process its application utilizing information Palm Bay was no longer required to provide at the time it filed its application. Moreover, nothing contained on these portions of the applications raise substantial and material questions of fact regarding Palm Bay's compliance with current Commission rules and policies. Accordingly, FIT's objections to both Palm Bay's proposed weekly program schedule (Exhibit 5) and its Issues/Programs Statement (Exhibit 6) are without merit.

14. Finally, FIT alleges that Palm Bay's application should be dismissed because the applicant has violated 47 C.F.R. § 1.65 by failing to report its correct address, its corporate status, and the current address of several members of its board of directors. In opposition, Palm Bay details the difficulty it incurred receiving mail in care of the Palm Bay Baptist Church; this difficulty necessitated the renting of a post office box. Palm Bay acknowledges that some of its directors have moved since 1984, and admits that it had failed to timely provide their current address. FIT replies that Palm Bay's claim of the Postal Service failing to deliver mail at the church is heresay and that Palm Bay's relationship to the church arouses the possibility that the church may be a real party in interest.

15. However, FIT has failed to provide supporting evidence to sustain its allegation that Palm Bay Baptist Church is a real party in interest in the Palm Bay application and we, therefore, determine that it does not present a *prima facie* real party in interest issue. The applicant's failure to timely provide a current address for itself and its board of directors was a relatively minor rule violation and constitutes an isolated instance of noncompliance. Accordingly, no substantial and material questions of fact regarding Palm Bay's qualifications are raised by the Section 1.65 violation. We also note that on November 13, 1989, Palm Bay filed a minor curative amendment which provided both its current mailing address as well as those of its directors and, thus, has remedied these deficiencies.

16. Accordingly, for the reasons set forth above, the petition to deny filed by the Florida Institute of Technology IS HEREBY DENIED and the application of Palm Bay Public Radio, Inc. (BPED-841113MA) IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Under the cut-off procedures, applications accepted for filing are placed on an "A" cut-off public notice which provides a thirty-day period for the filing of applications that are directly in conflict with those listed or that are indirectly interlinked with those listed by new applications filed prior to the expiration of the thirty-day period. The procedure is designed to permit the Commission to cease accepting applications from new parties so that a choice can be made between timely filed applicants. *See, e.g., RKO General, Inc. (WNAC-TV)*, 89 FCC 2d 297, 320 (1982). After any such competing applications are filed, these applications are placed on a "B" cut-off notice which provides for a 30-day period for the filing of petitions to deny, as well as minor change amendments to the applications.

[2] Pursuant to paragraph 54 of the *Memorandum Opinion and Order* in Docket 20735, 50 Fed. Reg. 27954 (1985) (*"Memorandum Opinion and Order"*), those parties having before the Commission a pending application for a construction permit for a new station or a modification of an existing station had until October 1, 1985, to amend their application to comply with the then new TV Channel 6 interference rules adopted therein or provide a showing that the existing application was in compliance with those rules. On November 22, 1985, Central had requested an extension of time to December 31, 1985 to comply with this requirement. When Central ultimately failed to comply, its application was dismissed in accordance with 47 C.F.R. §§ 73.3566(b) and 73.3568(b) for failure to prosecute.

[3] FIT has appealed this decision to the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Cir. No. 89-1187). The appeal has been held in abeyance by the Court pending Commission action on FIT's petition to deny Palm Bay's application. Favorable action by the Commission on FIT's petition could moot its appeal. *See* paragraph 5, below.

[4] Pursuant to 47 C.F.R. § 73.3573(a)(1), an amendment constitutes a major change in facilities if it proposes, *inter alia*, a reduction in coverage of more than 50% of the area proposed in the application as originally filed.

[5] While FIT's petition to deny addressed the issue of Palm Bay's potential objectionable interference to television Channel 6 station WCPX(TV), Orlando, Florida, this allegation was fac-

tually wrong, as indicated in Palm Bay's opposition. In its reply pleading, FIT raises a new matter heretofore unaddressed in the petition -- the impropriety of the Commission not establishing a new "A" cut-off list in response to Palm Bay's September 27, 1985 amendment. Section 1.45 of the Commission's Rules defines what issues may or may not be raised in a reply pleading. In this respect the Review Board has previously stated: "A reply pleading to the extent that it contains wholly new and previously unmentioned allegations of fact, will be dismissed. To allow the reply to serve the purposes of the original petition would be either to effectively render meaningless provisions of the rules for a fair opportunity by another party to respond to allegations, or to compel the addition of supplementary pleadings not ordinarily contemplated by the rules." *Industrial Business Corp.*, 26 RR 2d 1447 (Rev. Bd., 1973). Since a copy of the Palm Bay application file is readily available to the public, and the Commission published notice on October 11, 1985 of Palm Bay's amendment, the arguments contained in FIT's reply would have been more appropriately raised in FIT's petition. However, the underlying matters referred to in FIT's reply pleading had their origins more than five years earlier and have, until the instant proceeding, never been directly addressed by the Commission. Therefore, because the substantive issues raised in FIT's pleading merit clarification, we have responded to them in this Order.

[6] It should also be noted that the rules generally contemplated amendments reducing, not increasing, coverage of proposed facilities so no new areas of potential mutual exclusivity were created. Such was the case here.

[7] FIT further contends that, by deleting the horizontal component of its proposed output signal and either using filters or reducing power, Palm Bay could have submitted a minor change amendment which would have also complied with the new TV channel six interference rules. It is Commission policy to consider only the proposal before us; we do not undertake to consider hypothetical or alternative proposals. *See e.g., WSET, Inc.*, 80 FCC 2d 233 (1980). Of course, if a minor amendment were filed, FIT would have no argument that its rights were violated. In any event, the Commission did not limit the manner in which applicants could seek to comply with the new TV Channel 6 requirements, and we find that Palm Bay's response to those requirements was reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mark Pierce FOIA Control No. 90-105

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1991; Released: March 29, 1991

By the Commission:

1. Before the Commission is an Application for Review filed by Mark Pierce, seeking review of a ruling entered by the Chief, Field Operations Bureau (FOB), which denied Mr. Pierce's Freedom of Information Act (FOIA) request. *See* 5 U.S.C. § 552(b). In his initial request, Mr. Pierce sought access to Commission documents (1) listing and prioritizing "The Ten Most Wanted" unlicensed radio stations and operators, and (2) describing the methodology for determining which stations and operators should be so listed.

2. The only document responsive to Mr. Pierce's FOIA request is a one page, internal memorandum prepared by FOB, which lists the "ten most wanted" pirate broadcast stations under active investigation. The Bureau informed Mr. Pierce that release of the "Ten Most Wanted" list could hamper its investigative strategy for detecting illegal operators and would thwart the effectiveness of its law enforcement activities. Consequently, FOB denied Mr. Pierce's request. On appeal, Mr. Pierce requests disclosure of the material withheld, arguing that the Commission has released "most wanted" lists in the past without compromising its investigative efforts.[1]

3. FOB properly withheld the "Ten Most Wanted" list. It is not the policy or the practice of the Commission to release the identity of investigatory targets in non-public investigations, including the identity of stations and operators that the Bureau has targeted for investigation. Release of the identity of target stations and operators could disrupt FOB's investigations by alerting illegal operators that they are the subject of enforcement action, thus enabling them to modify their illegal operations and elude detection. *See J. P. Stevens & Co. v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983); *see also Moorefield v. Secret Service*, 611 F.2d 1021, 1026 (5th Cir.), *cert. denied*, 449 U.S. 909 (1980). Consequently, FOB's priority list of illegal stations and operators warrants the protection afforded by Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which protects documents the release of which would interfere with law enforcement investigations.

4. Accordingly, for the reasons set forth above, IT IS ORDERED, That the Application for Review filed by MARK PIERCE IS DENIED. The Requestor may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Mr. Pierce also argues that the Commission should disclose all records containing the criteria for compiling the "Ten Most Wanted" list. There are, however, no agency records within the scope of this request.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-80

In re Applications of

LORRAINE WALKER ARMS	File No. BPCT-881202KK
TIERRA ALTA BROADCASTING, INC.	File No. BPCT-881205KJ
ECHONET CORPORATION	File No. BPCT-881205KM

For Construction Permit for a
New Television Station on Channel 15,
Las Vegas, Nevada

Appearances

David D. Oxenford, Esq., Lisa C. Wilson, Esq., and *Lester Spillane, Esq.*, on behalf of Lorraine Walker Arms; *Paul A. Zevnik, Esq.* and *Andrew A. Cohen, Esq.*, on behalf of Tierra Alta Broadcasting, Inc; *David M. Silverman, Esq.*, and *Robert G. Scott, Esq.*, on behalf of Echonet Corporation; *Larry A. Miller, Esq.*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: March 21, 1991; Released: March 29, 1991

I. PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Lorraine Walker Arms, Tierra Alta Broadcasting, Inc., and Echonet Corporation for a construction permit for a new television station on Channel 15 in Las Vegas, Nevada. By *Hearing Designation Order*, DA 89-379, released April 13, 1989, the Chief, Video Services Division, Mass Media Bureau, designated the foregoing applications, together with other applications since dismissed, for a comparative hearing. The issues remaining for determination are as follows:

1) To determine which of the proposals would, on a comparative basis, best serve the public interest.

2) To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

II. FINDINGS OF FACT

Lorraine Walker Arms

2. Mrs. Arms proposes to be integrated full time into the day-to-day management of the televison station as its general manager. Arms Exhibit 1. She will be responsible for station policies, and will oversee all aspects of station operations. Mrs. Arms is a caucasian female, and has resided in Las Vegas, Nevada, since April 1987. She is a member of the Las Vegas Chamber of Commerce. She is also a member of Women in Communications (which raises money for university scholarships), and has manned booths for that organization for Easter Seal events, and promoted and helped out on the Nevada Junior Olympics. She has also participated in voter registration promotion and United Blood Service.

3. Mrs. Arms first worked in broadcasting as a sales person at KFBD in Great Falls, Montana, in 1964. In 1966, she began working in sales with KCBN, Reno, Nevada, where she became sales manager. In 1967, she became general manager. She bought the station in 1971 and subsequently applied for, obtained and built KRNO (FM), Reno. She personally managed these stations until they were sold on March 1, 1982. In May of 1982, Mrs. Arms applied for what was to become KRLV (FM) in Las Vegas. Through litigation, coupled with settlement, Arms got the permit for this station, put it on the air on August 18, 1987 and personally managed it until it was sold to Wescom, Inc. of Nevada (Arms Ex. 1; Tr. 92 - 93).

4. By an amendment filed March 13, 1990, Arms reported that radio stations KCBN (AM) and KRNO (FM), Reno, Nevada, which she sold to Roth Communications in March, 1982, may, because of Roth's inability to complete the purchase, be transferred back to her. In any event, Arms committed to divest herself of all ownership interest in or connection with those stations if her application in this proceeding is granted.

5. Mrs. Arms has been a continuous resident of Las Vegas since April 1987. Should she reacquire stations KRNO AM and FM, she would return to Reno to operate them, but would maintain her Las Vegas residence and, in accordance with her divestiture commitment, continue to reside in Las Vegas and manage her proposed television station on a full-time basis. Tr. 54, 55, 89, 96-97.

6. Mrs. Arms sold radio station KRLV-FM, Las Vegas, Nevada, in 1989. The buyer of the station was Wescom of Nevada. Tierra Alta Ex. 4. Part of the asset purchase agreement covering the sale of the station was a non-competition agreement under which Wescom pays Mrs. Arms $25,000 quarterly, for a total of $400,000 over the four year course of the agreement. Wescom's obligations to make payments under the non-competition agreement terminates upon any material breach by Mrs. Arms.

7. In return for the $400,000 payment, Mrs. Arms must refrain from certain activities for the period June 30, 1989 until March 31, 1993. Tierra Alta Ex. 4; Tr. 61. Specifically, Mrs. Arms "shall not directly or indirectly hire, solicit or encourage to leave the employment of [Wescom], any employee of [Wescom] or hire any such employee who has left the employment of [Wescom] within one year of the termination of such employee's employment . . . unless [Wescom] shall consent thereto in writing. Mrs. Arms may not encourage any consultant working with Wescom to cease working with Wescom, or hire any consultant then under contract with Wescom in any capacity.

8. The non-competition agreement prohibits Mrs. Arms from solicting "any past or present customers or potential customers" of Wescom. The agreement also prohibits Mrs. Arms from disclosing or using

> for the benefit of herself or others all confidential matters of [Wescom], including, without limitation, trade 'know-how', secrets, consultant contracts, customer lists, pricing policies, operational methods, marketing plans or strategies, product development techniques or plans, or business acquisition plans, new personnel acquistion plans and research projects and other business affairs of [Wescom] learned by her heretofore or hereafter, and shall not disclose them to anyone, except . . . with [Wescom's] express written consent.

9. Mrs. Arms introduced in the record letter dated August 9, 1989 from the chairman of Wescom which states:

> I hereby confirm that we do not consider your proposed application for a license for Channel 15, in Las Vegas (or the subsequent ownership and management thereof) to be in conflict with your non-competition agreement under Section 21 of the asset purchase agreement among yourself, A & A Broadcasting Corp., and Wescom of Nevada, Inc. dated March 2, 1989, as amended.

Tierra Alta Broadcasting, Inc.

10. Tierra Alta is a corporation organized under the laws of the state of Delaware. Irma Rico, a Hispanic female, is its sole officer and director, and is the holder of all the applicant's voting common stock. Tierra Alta Ex. 1.

11. Irma Rico will be integrated into the day-to-day management and operation of the station as Tierra Alta's general manager. She will move from her present residence in Rhode Island to Las Vegas, Nevada. Tierra Alta Ex. 2. She will work at the station on a full-time basis (a minimum of 40 hours per week). As the general manager, Ms. Rico will be responsible for the day-to-day supervision of all functions at the station, including programming, news, business, sales, engineering functions, and personnel.

12. Ms. Rico has previously resided in Las Vegas, in 1977 through 1978. While residing in Las Vegas, Ms. Rico volunteered her time for civic and community activities concerned with cystic fibrosis. Tierra Alta Ex. 2. The extent of that activity is not shown on the record, although it is said to have involved fundraising. Tr. 151-152.

13. From 1979 to 1982, Ms. Rico was employed as an account executive at KFTV (TV), Hanford-Fresno, California. From 1982 to 1985, Ms. Rico was employed as an account executive at KMPH (TV), Fresno, California. In March 1985, Ms. Rico became Local Sales Manager at WSTG (TV), Channel 64, Providence, Rhode Island. In that position, she supervised seven account executives and two additional staff members. In September 1987, Ms. Rico became the National Sales Manager at Channel 64, licensed to Price Communications. Ms. Rico held this position until February 28, 1990. Ms. Rico pledged to terminate her position at Channel 64 should Tierra Alta's application be granted.

14. Neither Tierra Alta nor Irma Rico has any interest in any medium of mass communications. Tierra Alta Ex. 1; Tierra Alta Ex. 2.

Echonet Corporation

15. Echonet is a Colorado corporation, and has one class of stock, common voting stock. Each share of common voting stock is entitled to one vote. Echonet's directors, officers and shareholders are as follows: Charles Ergen, President/Director, 40% ownership and voting interest; David M. Drucker, Vice President/Director, 20% ownership and voting interest; Candy Ergen, Secretary/Treasurer and Director, 40% ownership and voting interest; and Paul Garber, Vice President.

16. Echonet does not propose any integration in this proceeding. Echonet holds contruction permits for full power television stations located in Anchorage, Alaska and Billings, Montana (Echonet Ex. B.). An affiliate of Echonet, with the same ownership, Echonet-Longmont Corp., holds a 50% voting interest in Longmont Channel 25, Inc., permittee of channel 25 Longmont, Colorado. Charles Ergen and David Drucker, officers, directors and 60% shareholders of Echonet, own 100% of television station KUBD, which operates on Channel 59, Denver, Colorado. Echonet also owns six low power televison licenses and contruction permits, located in Fort Collins, Colorado, Austin, Texas, Cheyenne, Wyoming, Albuquerque, New Mexico, Anchorage, Alaska, and Colorado Springs, Colorado. Echonet also holds low power construction permits for Grand Junction, Colorado, and Anchorage, Alaska. Penny Drucker, wife of David Drucker, owns a television construction permit for UHF-TV Channel 22, Key West, Florida, a low power television license for Santa Fe, New Mexico, and a low power televison construction permit for Aspen, Colorado. Charles Ergen, Cantey Ergen and David Drucker, officers, directors and holders of all of Echonet's voting stock, also own 100% of EchoStar Satellite Corporation, holder of a construction permit for a direct broadcast satellite system.

Comparative Coverage

17. There is no decisionally significant difference in proposed service to underserved areas, or in the number of perons proposed to be served by the competing applicants. Joint Ex. 1.

III. CONCLUSIONS OF LAW

Lorraine Walker Arms

18. Arms has a non competition agreement with the buyer of what had been her radio station KRLV-FM, Las Vegas, Nevada. The opposing parties argue for a denial or a reduction in Arms' claim for 100 percent quantitative integration credit, saying that the agreement substantially restricts Arms in the operation of "any broadcast station," and that the whole "premise of integration credit is that the owner/licensee will have greater control over station operations if the owner controls the station's personnel, programming, and business affairs every single day." Under her agreement with Wescom, Ms. Arms may not a) hire any employee of her former station within one year

after that employee leaves the station; b) hire any consultant under contract with Wescom in any capacity; c) solicit any past, present, or future customers of Wescom; or d) disclose to her future employees or use in any way information from KRLV that falls within an extensive list in the agreement. In sum, Arms' opponents argue that the terms of the non-competition agreement effectively limit Arms' ability "to conduct the station in the best public interest."

19. Arms' position is that her non-competition agreement "only applies to radio and has no effect with respect to her television application," and that her Exhibit 2 (a letter from the chairman of Wescom) "expressly excludes television from the non-compete, and is thus overriding." However, Arms' Exhibit 2 makes no "express" mention of either television or radio. Even, so, that exhibit provided the basis for Ms. Arms' testimony that the non-competition agreement applied only to radio operations (Tr. 65). With that belief, Arms went further in offering her interpretation of what the agreement with Wescom means: consistent with the agreements, " I could still compete against them in television, but not in a radio station, but I still would not be free to take their employees." (Tr. 66). That view of the agreement may or may not be shared by the chairman of Wescom, who states in his letter only that Wescom would not consider Arms' management of the television station to violate the non-competition agreement. The fact is that this record does not reveal the basis upon which Wescom rests its view of the agreement.

20. Arms is a sole owner who proposed to work full-time at the proposed station in a managerial capacity. She is therefore entitled to 100 percent quantitative integration credit. Notwithstanding Arms' unconvincing testimony about the matter, and notwithstanding the fact that the basis for Wescom's view as expressed in Arms' Exhibit 2 is unrevealed, Arms still receives 100 percent quantitative integration credit. If the restrictions of the non-competition agreement are deemed to apply full-force to Arms' proposed operation of the television station, the agreement may limit what Arms can *accomplish* (*e.g.*, achieving a profitable operation in the shortest possible time), but the agreement in no way limits her participation *in* the management of the proposed station.

21. Arms' integration proposal is qualitatively enhanced by her female status. The proposal is also enhanced by Arms' continuous residency in Las Vegas and by her participation in civic activities there. Finally, the integration proposal is enhanced by Arms' broadcast experience.

Tierra Alta Broadcasting, Inc.

22. Tierra Alta is entitled to 100 percent quantitative integration credit for its proposal to integrate its sole voting shareholder Irma Rico as the station's full-time general manager. The integration proposal is enhanced qualitatively by virtue of the fact that Rico is a female and also because she is a Hispanic. Rico's broadcast experience enhances the proposal to a slight degree, and her former one-year residence in Las Vegas and promise of future local residency enhance the proposal to a slight degree also. Rico's participation in some civic activity while a resident in Las Vegas enhances the integration proposal very slightly.

Echonet Corporation

23. Echonet proposes no integration, and it receives no integration credit. Echonet is assessed a slight-to-moderate diversification demerit for its various media holdings, those of its affiliates, and those of its principals.

IV. ULTIMATE CONCLUSIONS

24. Neither Arms or Tierra Alta receives a diversification demerit. Arms' integration proposal receives a moderate enhancement because she is a female; a moderate enhancement for Arms' local residence since 1987; a slight enhancement for her participation in Las Vegas civic affairs; and a slight enhancement for her broadcast experience. Tierra Alta's integration proposal receives a moderate enhancement because Irma Rico is a female; a substantial enhancement because Rico is a member of a racial minority group; a slight enhancement for her brief past local residency and promise of future local residency; a very slight enhancement for her claimed participation in local civic activity; and a slight enhancement for her broadcast experience. Tierra Alta is the preferred applicant herein, and its application will be granted.

ACCORDINGLY, IT IS ORDERED THAT, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the decision on its own motion,[1] the application of Tierra Alta Broadcasting IS GRANTED, and the applications of Lorraine Walker Arms and Echonet Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276 (d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-302

In re Applications of

SANDRA M. ADAIR VAUGHAN — File No. BPH-880630MQ

PETERSBURG FM BROADCASTERS LIMITED PARTNERSHIP — File No. BPH-880630NX

For Construction Permit for a
New FM Station on Channel 262A
in Petersburg, Virginia

Appearances

Erwin G. Krasnow, *William E. Kennard*, and *Michael E. Beller*, on behalf of Sandra M. Adair Vaughan; *Edward P. Taptich*, *Francis E. Fletcher, Jr.*, *Kevin S. DiLallo*, and *M. Christina Carter-Pena*, on behalf of Petersburg FM Broadcasters Limited Partnership; and *Paulette Laden*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: March 21, 1991; Released: March 29, 1991

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Sandra M. Adair Vaughan (Vaughan) and Petersburg FM Broadcasters Limited Partnership (FM Broadcasters) for a new FM station on Channel 262A at Petersburg, Virginia. On June 25, 1990, the Chief, Audio Services Division, designated five applicants for hearing. *See Woody Limited Partnership*, 5 FCC Rcd 3800 (Audio Services Div. 1990) (HDO). Three other applicants originally designated for hearing have been dismissed.[1]

2. The HDO designated the following issues with respect to Vaughan and FM Broadcasters:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest;
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

Id. at 3801.

3. By *Order*, FCC 91M-426, released February 4, 1991, the Presiding Judge specified that in the event a construction permit is awarded to FM Broadcasters in this proceeding, such grant will be subject to the following condition:

> (i) whatever action, if any, the Commission may deem appropriate should former Graphic principals Yampol, Slodowitz and Finfer regain control of Graphic; the outcome of (ii) the appeal in *A.S.D. Answer Service, Inc. et al.*, CC Docket No. 82-587 *et seq.*; (iii) *Utah Telecourier v. MCI Telecommunications Corporation et al.*, and (iv) the untitled complaint brought by the U.S. Securities and Exchange Commission in the District Court for the Southern District of New York alleging filing with the SEC of false, misleading and untimely statements.

4. A prehearing conference was held on September 19, 1990. The hearing commenced and concluded on February 6, 1991. At the hearing, FM Broadcasters withdrew its integration proposal (Tr. 15). By agreement of the parties, Vaughan and FM Broadcasters withdrew, respectively, their requests to cross-examine the principals of the applicants (Tr. 12). The Presiding Judge closed the record at the conclusion of the hearing (Tr. 18-19); *Order*, FCC 91M-513, released February 8, 1991. Proposed findings of fact and conclusions were filed by the parties on February 25, 1991. No replies were filed.

Findings of Fact

Vaughan

Ownership Structure

5. Ms. Vaughan is an individual applicant (Vaughan Ex. 1 at 1).

Media Diversification

6. Ms. Vaughan owns no interest in any medium of mass communications, nor does anyone in her immediate family (Vaughan Ex. 1 at 6).

Integration of Ownership into Management

7. In the event her application is granted, Ms. Vaughan proposes 100% integration of ownership into management (Vaughan Ex. 1 at 3). She will work full-time, at least forty (40) hours per week, during normal business hours, as the station's General Manager. *Id.* In her capacity as General Manager, Ms. Vaughan will oversee all aspects of the management and operation of the station. *Id.* She will be ultimately responsible for formulating and implementing all station policies for programming, public affairs, sales and personnel, including hiring and supervising all station employees. *Id.* She will also be responsible for developing, implementing and maintaining the station's Equal Opportunity Program. *Id.* Ms. Vaughan will terminate all employment, including all part-time positions, and curtail any volunteer activities as necessary to fulfil her integration commitment. *Id.*

Qualitative Integration

Local Residence

8. Ms. Vaughan has resided at 2017 Dodson Road, Petersburg, Virginia since 1979 (Vaughan Ex. 1 at 4). She will maintain her permanent, full-time residence in Petersburg in the event that her application is granted. *Id.*

Minority and Female Ownership

9. Ms. Vaughan is a black woman (Vaughan Ex. 1 at 4).

Civic Involvement

10. Ms. Vaughan is active in a variety of educational, minority, social, and civic organizations which are located in or serve the Petersburg community (Vaughan Ex. 1 at 4). Currently, she devotes an average of five hours per week to civic activities. *Id.* She will curtail these activities as necessary to fulfill her integration proposal. *Id.* Ms. Vaughan intends to serve the community principally through her ownership and management of the station. *Id.* She will ensure that her station is responsive to the community's needs because she believes that the key to establishing a successful radio station lies in community service. *Id.*

11. The following list of activities is representative of Ms. Vaughan's service to and knowledge of the Petersburg community:

Present Affiliations

Member, State Board of Education (Virginia, appointed February, 1986, Chairman, Education Program and Policy Committee (since 1989); Member of Curriculum and Instruction Committee (since 1986);

Member, Regional Board of Directors, Signet Bank, appointed May, 1984;

Board of Directors, Petersburg Chamber of Commerce (since 1987); Vice President, Membership (since 1988).

Member, Board of Directors, Southside Virginia YMCA (since 1985);

Member, Committee on Prevention (Commonwealth of Virginia), (since 1987);

Member, Board of Directors, People for the American Way (since 1986);

Member, Petersburg Altrusa, Inc. (since 1988);

Member, Petersburg Christmas Parade Committee (since 1989);

Member, Links, Inc., Petersburg Chapter (since 1981);

Member, Delta Sigma Theta Sorority, Inc., Petersburg Alumnae Chapter (since 1982, inactive for 1990-1991);

Member, Jack & Jill, Inc., Petersburg Chapter (since 1982);

Member, Women's Auxiliary, Old Dominion Medical Society (since 1979);

Petersburg United Way Steering Committee (since 1989);

Member-elect, Petersburg Quota Club (since 1990).

Past Affiliations

Member, Committee - Commonwealth Alliance for Drug Rehabilitation (CADRE) (1988-1990);

Member, Virginia Equal Opportunity Monitoring and Advisory Committee for Higher Education (1986-1990);

Member/Vice Chairman, Petersburg School Board (1983-1986);

Member, Board of Directors, Virginia School Boards Association (1984-1986);

Vice-Chairman, Legislative Committee, Virginia School Boards Association;

Secretary Southside Region, Virginia School Boards Association (1984-1986);

Chairman, Quality of Life Committee, Industrial Development, City of Petersburg (1983);

Member, Board of Directors, Petersburg Ballet (1982-1984);

Member, Board of Directors, Playmakers Fellows (1982-1984);

Member, Women's Committee to Support the Symphony (early 1980's);

Co-Chairperson, United Negro College Fund, Petersburg, Virginia (1 year in early 1980's);

Member, White House Task Force on Minorities and Communication (approximately 1979);

Vaughan Ex. 1 at 4-5.

Broadcast Experience

12. In 1984 and from 1987 through 1990, Ms. Vaughan worked as a part-time producer of public affairs programming for television station WRIC, formerly WXEX, Petersburg, Virginia (Vaughan Ex. 1 at 5-6). She prepared legal commentaries in 1984 and co-hosted a talk show from 1987 through 1990. *Id.* at 6. She no longer has any connection with WRIC. *Id.*

13. From 1984 until 1989, Ms. Vaughan produced and broadcast public affairs programming for WGCV(AM) and WPLZ-FM, Petersburg, Virginia. *Id.* She prepared weekly commentaries and hosted a monthly children's talk show. *Id.* Additionally, she performed promotional and community relations duties. *Id.* In light of Ms. Vaughan's pending application, the stations have reduced her activities. *Id.* She currently hosts the children's talk show program on a monthly basis and is coordinating the stations' Fifth Annual Black History Month Arts and Essay Contest. *Id.* She will terminate her relationship and sever all connections with WGCV(AM) and WPLZ-FM in the event that her application is granted. *Id.*

Auxiliary Power Generators

14. Ms. Vaughan will install and maintain auxiliary power generators at both the studio and transmitter locations of sufficient capacity to power the transmitter and main studio in the event of a power failure at one or both locations (Vaughan Ex. 2 at 1).

FM Broadcasters

Ownership Structure

15. FM Broadcasters is a limited partnership organized under the laws of the State of Virginia as follows:

Name	Equity Interest
Cathis M. Hall 35% general partner	15%
Private Networks, Inc. (PNI) 65% general partner	42.5%
Broadcast Data Corp 100% limited Partner	42.5%

FM Broadcasters Ex. 1 at 1

The principals of PNI are as follows:

Billy J. Parrott
President, Director
and 42.3% stockholder

William Walker
Vice President, Secretary/Treasurer,
Director and 42.3% stockholder

James H. Gray
9.4% stockholder

Robert H. Parrott
5.0% stockholder

Charles V. Richardson
1.0% stockholder

Id.

Media Diversification

16. Neither FM Broadcasters nor Ms. Hall own any interest in any medium of mass communications (FM Broadcasters Ex. 2 at 1).

17. PNI holds a 51% interest in PN Radio Company, a general partnership. PN Radio Company has the following ownership interests:

Radio Orlando Orlando, FL Construction Permit (WEZO(FM), formerly WURG) 30.7% interest as general partner	BMPH-880920IG
Twin Rivers Communications Limited Partnership Upper Arlington, Ohio Licensee (WXMS(FM)) 37% interest as limited partner	BPH-860505MM

Id. at 2.

18. William Walker, Vice President, Secretary/Treasurer, Director and 42.3% stockholder of PNI, a General Partner of FM Broadcasters, has the following ownership interest:

Florida Radio Broadcasting (FRB) Coral Cove, FL 51% general partner interest	BPH-871203NI

Id. at 3. The application of FRB was dismissed pursuant to a Settlement Agreement on January 4, 1991, *Memorandum Opinion and Order*, Docket No. 90-62, FCC 91M-18, released January 4, 1991. Vaughan understands that Mr. Walker is the managing general partner and 12.75% equity owner of Coral Cove FM Radio Partnership, the merged entity formed pursuant to the Settlement Agreement. The Commission has granted the application of Coral Cove FM Radio Partnership.

Id.

19. PNI has the following MMDS and MDS interests:

Entity	Call Sign	Status	Public Notice/ Expiration Date (Exp.)
Atlanta MDS Co., Inc. Atlanta, GA (25% interest)	WGW309	license	5/01/91 (Exp.)
Chicago MDS Co. Chicago, IL (33 1/3% interest)	WHT562	license	5/01/91 (Exp.)
PNI Houston, TX (100% interest)	WHT570	license	5/01/91 (Exp.)
Indianapolis MDS Co. Indianapolis, IN. (50% interest)	WLK246	license	5/01/91 (Exp.)
Los Angeles MDS Co. Los Angeles, CA (20% interest)	WHD479	license	5/01/91 (Exp.)
Minneapolis MDS Co. Minneapolis, MN (50% interest)	WCU552	license	5/01/91 (Exp.)
New York MDS Co. New York, NY (20% interest)	WLK227	license	5/01/91 (Exp.)

Phoenix MDS Co. Phoenix, AZ (33 1/3% interest)	WHB522	license	5/01/86 (Exp.)
San Diego MDS Co. San Diego, CA (50% interest)	WHT559	license	8/02/88 (Exp.)
San Francisco MDS Co. San Francisco, CA (16.66% interest)	WLK228	license	5/01/91 (Exp.)
St. Louis MDS Co. St. Louis, MO (25% interest)	WHT702	license	5/01/91 (Exp.)
Washington MDS Co. Washington, D.C. (20% interest)	WHT747	license	5/01/91 (Exp.)
Orlando BDC/MMDS Co. Orlando, FL (66 2/3% interest)	WHT732	license	5/01/91 (Exp.)
PNI Huntsville, AL (100% interest)	WLW773	license	6/06/90 (Exp.)
Glens Falls BDC/MMDS CO. Glens Falls, NY (66 2/3% interest)		tentative selective	10/23/86
PNI Ithaca, NY (100% interest)		tentative selective	1/21/87
PNI Lawton, OK (100% interest)		tentative selective	9/30/86
PNI Decatur, IL (100% interest)	WHT634	tentative selective	9/24/85
Miami MDS Co. Miami, FL (25% interest)	N/A	license	N/A
Milwaukee MDS Co. Milwaukee, WI (25% interest)	WHT566	license	(construction certification date) 11/15/90
Lakeland BDC/MMDS Co. Lakeland, FL (66 2/3% interest)	WHK925	license	(construction certification date) 5/16/90

Id. at 4-6.

Integration of Ownership into Management

20. FM Broadcasters withdrew its integration proposal at the hearing (Tr. 15). FM Broadcasters proposes no integration of ownership into management.

Auxiliary Power Generators

21. FM Broadcasters proposes to install auxiliary power generators at both the studio and transmitter locations of its proposed facilities (FM Broadcasters Ex. 3 at 1).

CONCLUSIONS OF LAW

22. On the basis of their respective integration proposals and media ownership, Vaughan is the vastly superior applicant. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394-396 (1965). Ms.Vaughan proposes 100% integration of ownership into management. Her proposal is substantially enhanced by minority and female ownership, civic participation and broadcast experience. She has no interest in any other medium of mass communications. In contrast, FM Broadcasters warrants a moderate diversification demerit for the media interests of PNI and William Walker. It proposes no integration of ownership into management. There is no comparative coverage issue designated in this proceeding and both applicants propose to install auxiliary power generators. Therefore, Ms. Vaughan's integration and diversification preferences are clearly decisive. The public interest is served by a grant of Ms. Vaughan's application.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[2] the application of Sandra M. Adair Vaughan for a construction permit for a new FM station on Channel 262A in Petersburg, Virginia IS GRANTED; and the application of Petersburg FM Broadcasters Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] *See Order*, FCC 90M-2536, released August 3, 1990 (dismissing applications of Walsh & Partners Communications, Inc. and Sladeco Broadcasting Limited Partnership, a Limited Partnership); *Order*, FCC 90M-3749, released November 28, 1990 (dismissing Woody Limited Partnership).

[2] In the event exceptions are not filed within 30 days after the release of this Initial decision, and the Commission does not review the cases on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-312

In re Applications of

PLEASANT HOPE BROADCASTING CO., L.P.	File No. BPH-871209MB
KOYLE BROADCASTING CORPORATION	File No. BPH-871210MD
MINORITIES BROADCASTING COMPANY OF MISSOURI, INC.	File No. BPH-871210ME
MULTICOM BROADCASTING	File No. BPH-871210MF

For Construction Permit for a
New FM Station on Channel 238C2
in Pleasant Hope, Missouri

Appearances

Vincent J. Curtis, Jr., Robert A. DePont and *Anne E. Goodwin* on behalf of Pleasant Hope Broadcasting Co., L.P.; *Matthew H. McCormick* and *Troy F. Tanner* on behalf of Charles T. Williams; *Dennis P. Corbett* and *Sally A. Buckman* on behalf of Koyle Broadcasting Corporation; *Francis E. Fletcher, Jr., Michael L. Glaser*, and *Joseph P. Benkert* on behalf of Minorities Broadcasting Company of Missouri, Inc.; *Steven Diaz Gavin* and *Paula Perrone* on behalf of Multicom Broadcasting, Inc.; and *Robert Zauner* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: March 21, 1991; Released: April 1, 1991

I. PRELIMINARY STATEMENT

1. This proceeding involves four mutually exclusive applications for authority to construct and operate a new FM broadcast station on Channel 238C2 at Pleasant Hope, Missouri. The issues are:

(1) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(2) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. The prehearing conference was held on September 19, 1989. The hearing sessions were held January 9 and 10, 1990. The record in the case was closed on January 10, 1990. Tr. 473.

II. FINDINGS OF FACT

Pleasant Hope Broadcasting Co. (PHBC)

3. PHBC is a Missouri limited partnership. The PHBC application was filed December 9, 1987 (Williams Ex. 2, p. 1), the applicant's Limited Partnership Agreement was signed on August 11, 1989 (Williams Ex. 5, p. 1), and its Certificate of Limited Partnership was filed with the Missouri Secretary of State on August 21, 1989 (Williams Ex. 7, p. 1). In Section 2 of its application as originally filed, PHBC marked the "limited partnership" box and listed three principals: Larry Mitchell, Noel Boyd and Paula Landers. Mitchell was identified as "President and Manager" with 60% of the entity's votes. Boyd and Landers were listed as each having 20% of the entity's votes. Williams Ex. 2, pp. 2-3. PHBC did not attempt to amend its application to state that Landers and Boyd would have no votes until after the case was designated for hearing. That post-designation amendment, filed August 16, 1989, was accepted for reporting purposes only. *Order*, FCC 89M-2808 (released December 20, 1989).

4. The entity was first formed in late November, 1987. PHBC Ex. 1 at 1. Mitchell had decided to file an application, and he sought investors to join with him. He contacted, among others, Boyd and Paula Landers. Mitchell and Boyd had been friends for about 30 years and had attended high school together. Tr. 25, 82-83. Mitchell is also a customer at the Pleasant Hope Bank, of which Boyd is the president. Prior to becoming involved in PHBC, Boyd had not known Landers. Tr. 32.

5. From the beginning, Mitchell understood that neither Boyd nor Landers wished to take any active role in the management of the partnership's affairs. PHBC Ex. 1 at 1. Even so, Mitchell, who prepared the non-engineering portions of the application, decided to list himself in the application as having 60 votes and 60 percent of the votes; he was also the person who decided that Boyd and Landers each would be listed in the application as having 20 votes and 20 percent of the votes. Tr. 66. Mitchell placed those figures on the form because, in addition to questions concerning percentage of ownership, the form also contained questions about the number of votes and the percentage of votes, and Mitchell assumed that numbers had to be placed there. Tr. 68.

6. Mitchell had no clear idea of the characteristics of a limited partnership when he prepared the application. PHBC Ex. 1 at 2. He did, however, state in the application that the form of the applicant was a limited partnership. He also indicated in the application that Boyd and Landers would have partnership votes despite the fact that Boyd and Landers were to be limited partners. Whether they were actually to have partnership votes was irrelevant to Mitchell because his percentage ownership exceeded the combined ownership of Boyd and Landers and therefore he could always out vote them and always be in control. *Id.*; Tr. 94-95. Mitchell did not consult with either Boyd or Landers concerning whether or not they would have any vote.

7. At the time the application was filed, Mitchell believed PHBC was a limited partnership because the ownership was unevenly distributed. Tr. 73. Soon after PHBC's application was designated for hearing, Mitchell retained both communications counsel and local counsel on behalf of PHBC. It was then that he learned of the legal requirements and significance associated with the limited partnership form. PHBC Ex. 1 at 2. Consultations with counsel led to the decision to have the partners enter a written agreement. The initial limited partnership agreement was signed on August 11, 1989, and it was amended, at the suggestion of communications counsel, on August 14, 1989.[1]

8. Mitchell testified that the general terms of the written limited partnership agreement reflected what had been agreed among the partners prior to the filing of PHBC's application. PHBC Ex. 1 at 3; Tr. 72. At that time, Mitchell decided that he would have an equity interest of 60 percent, as the application was his idea and he would be doing the work involved. PHBC Ex. 1 at 1; Tr. 66. The partners agreed that the remaining 40 percent would be divided evenly between Landers and Boyd, so that each of them would have a 20 percent equity interest. The partners also agreed that the cost of prosecuting their application would be divided among the partners in proportion to this equity percentages. Tr. 73-74. Additionally, the partners agreed that Mitchell would be the one person active in the management of the partnerships affairs. PHBC Ex. 1 at 1. Prior to the filing of the application, however, the partners did not discuss legal limitations on the limited partners' involvement with or participation in PHBC's proposed station, such as prohibitions against being an employee, lack of voting rights, or restrictions on communications. Tr. 41, 71-73.

9. The partnership agreement was amended on November 3, 1989, to remove Landers as a limited partner. Williams Ex. 6 at 9-11. She resigned, partner, and the funds which Landers had contributed to PHBC were refunded to her. Tr. 46. Her equity interest was divided between Mitchell and Boyd in accordance with their relative equity interests in the partnership. Consequently, Mitchell now has an equity interest of 75 percent, and Boyd has an equity interest of 25 percent.

10. If PHBC's application is granted, Mitchell will serve as the full-time General Manager and Chief Engineer of the proposed station working on a daily basis and devoting at least 40 hours per week to those positions. As General Manager, he will have ultimate responsibility and authority for all decisions affecting the station. He testified that the programming of the station, as well as administrative, financial, sales and marketing aspects of the station's operation would be under his ultimate supervision. PHBC Ex. 2, p. 1.

11. Mitchell currently resides approximately five miles from Pleasant Hope and within the 1.0 mV/m service area of PHBC's proposed station. He will continue to live at his present address in the event PHBC's application is granted. Mitchell first lived at that address from February 1969 to December 1971 and has lived there continuously since September 1984. From September 1961 to February 1969 and from December 1971 to September 1984, Mitchell was in the U.S. Air Force. While in the Air Force, he kept his permanent address at his home near Pleasant Hope and during 1972 and 1973, he visited his home approximately 60 days per year. From 1974 to 1977, he was in Germany and did not visit Missouri. From 1977 to 1980, he visited approximately 60 to 90 days each year. From 1980 to 1984, he visited approximately eight days per year.

12. Mitchell was born in Springfield, Missouri on May 13, 1943. He graduated from Pleasant Hope High School in 1961. Prior to 1961, he lived for approximately 10 years on his parents' farm near Pleasant Hope. From the time he was born until his family moved to the farm, Mitchell lived in Springfield, within the 1.0 mV/m contour of PHBC's proposed station. *Id.*, pp. 1-3.

13. From 1986 until April 1989, Mitchell was a member of the Pleasant Hope Board of Education. He was president of the Board from 1987 until April 1989. While on the Board, he spent approximately 25 hours per month on its activities. *Id.*, p. 3. Mitchell has been an active member of the Pleasant Hope Parent-Teachers-Students Association since 1986. He has been a member of the Young Farmer's Organization in Pleasant Hope since that organization was founded in 1987. Mitchell teaches a Sunday school class at the Pleasant Hope Fundamental Baptist Church each week. He has been a Sunday school teacher since 1988. Mitchell has been the Committee Chairman of Boy Scouts Pack Number 129 in Pleasant Hope since 1987 or 1988, and has been involved with the Boy Scouts in Pleasant Hope since 1986. He has also been involved since 1985 in the activities of the Summer Sports Program which sponsors a young persons' baseball league during the summer months. He has served as a chaperone at all of the high school dances in Pleasant Hope since 1985. Mitchell has been a member of the Pleasant Hope Masonic Lodge since 1972. In 1987, he worked on the Christmas parade in Pleasant Hope, arranging for sponsors and directing the timing of the parade. Finally, Mitchell has been a member of the Historical Society of Polk County for two to three years.

14. Mitchell has performed contract engineering work for several radio stations, including KYOO (AM) and KYOO-FM, Bolivar, Missouri, where he has worked part-time as chief engineer since 1984. He also has been chief engineer for Station KBFL (FM), Buffalo, Missouri, since 1987. In December 1989, he began doing contract engineering work for KGBX (AM), Springfield, Missouri and KGBX-FM, Bolivar, Missouri. For the past two years he has been doing similar work for KAYQ (FM), Warsaw, Missouri. He also has worked as an engineer for a station in Aurora, Missouri, for two and a half to three years, as well as for two unidentified stations in Nevada, Missouri, for two years. *Id.*, at 5. Mitchell estimated that he spends ten hours per week on average on his contract engineering work (Tr. 90), and that he will either reduce or cease this activity if PHBC receives a construction permit. PHBC Ex. 2, at 5; Tr. 99. Mitchell also spends 3-4 hours per week raising beef cattle, an activity which he will reduce or cease in order to effectuate his integration pledge. PHBC Ex. 2, at 5.

15. Neither PHBC or its principals holds any media interest.

16. PHBC proposes to install auxiliary power generating equipment at both its transmitter and studio sites. PHBC Ex. 3.

Koyle Broadcasting Corporation

17. Koyle Broadcasting Corporation is a corporation organized under the laws of Missouri. Koyle Exhibits No. 1. Koyle is capitalized with two classes of common stock,

viz., voting and nonvoting stock. Karleen Koyle, is a female, owns 100 percent of the 2,000 shares of Koyle's issued and outstanding voting common stock. Mr. Douglas Whitman owns percent of the 2,000 shares of Koyle's issued and outstanding nonvoting common stock. Koyle Exhibit No. 1. Ms. Koyle is the president, treasurer and sole director of Koyle. Koyle Exhibit No. 1. Mr. Whitman is neither an officer nor director of Koyle. Koyle Exhibit No. 1. Mr. Thomas Peebles is the corporate secretary of Koyle and is neither a shareholder nor director. Koyle Exhibits No. 1. Ms. Koyle claims that she has exclusive voting control over Koyle's day-to-day management and over the day-to-day operations of Koyle's proposed station. Koyle Exhibits No. 1. In the event Koyle's application is granted, Ms. Koyle proposes to work full-time, a minimum of 40 hours per week on a day-to-day basis, as the station as its general manager. Ms. Koyle testified that she will have oversight and management responsibility for all aspects of the station's operations, including programming, sales and personnel. Koyle Exhibit No. 2. Ms. Koyle currently works as a sales director for Mary Kay Cosmetics. Koyle Exhibit No. 2. From approximately September 1984 through the present, Ms. Koyle has resided within Koyle's predicted 1.0 mV/m service contour. Ms. Koyle testified that she will continue to reside within the proposed station's service area in the event Koyle's application is granted. Koyle Exhibits No. 2.

18. From September 1984 to the present, Ms. Koyle has been involved with the Willard, Missouri ward of the Church of Jesus Christ of Latter Day Saints. Willard, Missouri, is within Koyle's proposed station's service area. Koyle Exhibit No. 2. Moreover, from October 1986 to June 1987, Ms. Koyle served as secretary-treasurer of Family Ties, a voluntary fundraising and support group for parents of students at the Developmental Center of the Ozarks, a school in Springfield, Missouri for children with diabetes. Ms. Koyle has also performed volunteer work at the Developmental Center during 1987 and 1989 consisting of assisting in a holiday gift wrap booth and assisting in an annual fundraising telethon during the Christmas seasons. From January 1988 to June 1989, Ms. Koyle served on the board of directors for the Developmental Center. Koyle Exhibit No. 2.

19. Mr. Whitman has been in the broadcasting business since 1971. Tr. 285. From 1971 to 1975, he worked during the summer months in broadcasting. He has worked in the broadcasting business on a permanent full time basis since 1975. He is currently employed as general manager at station KKIX-FM in Arkansas and has been so employed for the last 6 1/2 years. Tr. 286. Prior to working as general manager for station KKIX-FM, Mr. Whitman was general manager at station KITN. Moreover, Mr. Whitman was a sales representative at station KQEW for two years. Tr. 285-286.

20. Mr. Whitman and his spouse had pending an application for a radio station station in Lowell, Arkansas. Tr. 301-302. Mr. Whitman testified that he did not want an attributable interest in Koyle, in part, because of this pending application. Also, Ms. Koyle understood that Whitman was busy with various other commitments, and that he wanted no part in the management of the radio station. Tr. 148. Whitman himself told Ms. Koyle that he was interested only in being an investor. Tr. 329. After Koyle's application was filed with the FCC, Mr. Whitman reached a settlement agreement in the Lowell proceeding, and the FCC approved the settlement agreement. Tr. 302. Mr. Whitman has no reason to believe that the Lowell settlement agreement will not become final. Tr. 302-303.

21. Mr. Whitman learned of the Pleasant Hope allotment through a memorandum from his employer's communications counsel. Tr. 286. Mr. Whitman testified that after learning of the Pleasant Hope allotment, he traveled to Springfield, Missouri in November 1987 to acquaint himself with the economic environment of Pleasant Hope. Tr. 287.

22. Mr. Whitman testified that he made an effort to locate a church in the Pleasant Hope area which was of the same denomination as the church to which he belonged, *viz.*, the Mormon church. Tr. 289-93, 346-47. Through contacts, the name of which Mr. Whitman could not recall, he learned about a family (and apprised of a particular member of that family) that had once lived in Pleasant Hope and who currently resided in Willard. Tr. 140, 289. Whitman's contact, however, did not know the name of the "individual", but instead provided Mr. Whitman with the individual's parents' name and telephone number. Tr. 289. Mr. Whitman contacted these individuals who, in turn, provided Mr. Whitman with Ms. Koyle's name and telephone number. *Id.* Mr. Whitman testified that he then called Ms. Koyle for the purpose of determining the time and location of church services the next day. Tr. 291. Ms. Koyle had never previously heard of Mr. Whitman. Tr. 138.

23. By the time Mr. Whitman first contacted Ms. Koyle, he had already spoken to at least two other people regarding Ms. Koyle. Tr. 292-93. Mr. Whitman does not recall whether he inquired from either of these individuals the time and location of church services for his denomination. Tr. 292-93. Mr. Whitman testified that he did not recall why he did not simply call the Willard congregation itself to determine the time and place of services instead of going through the process of obtaining referrals, contacting Ms. Koyle's parents and then contacting Ms. Koyle. Tr. 346-47. Mr. Whitman next testified that there are no paid employees at the church who can answer telephones and that the telephone would merely ring on the chance that somebody might be there. Tr. 347. Despite the fact that the foregoing ordeal was allegedly church related, Mr. Whitman could not recall if he, in fact, called the church. Tr. 347.

24. After the telephone conversation with Ms. Koyle, Mr. Whitman met with Ms. Koyle at her home. Tr. 293-94. Mr. Whitman discussed radio stations in the Springfield area, and he informed Ms. Koyle that a frequency was opening up in Pleasant Hope and that he was interested in the frequency. Tr. 143; 294-95. Mr. Whitman testified that he does not recall who brought up the subject of radio stations in the Springfield area. Tr. 295. Mr. Whitman also testified that Ms. Koyle, not he, raised the question of whether there would be any new stations in the Springfield area. Tr. 294-95. Ms. Koyle, however, testified to the contrary. Tr. 143. Mr. Whitman further testified that it was after the subject of the Pleasant Hope allotment came up that he expressed an interest in being involved as an investor. Tr. 296. Although no decision was made during the initial meeting, Koyle and Whitman were both interested in continuing discussions. Tr. 297.

25. Mr. Whitman desired to meet someone he could get to know and trust well enough to formulate an application. Tr. 288. Mr. Whitman elected to proceed with Ms. Koyle. Tr. 315-16. Mr. Whitman, however, could not

recall what Ms. Koyle had stated her experience or prior work history had been during these meetings. Tr. 331. Moreover, Mr. Whitman was aware of the fact that Ms. Koyle had no broadcast experience. Tr. 315-16. Mr. Whitman was also aware of certain financial difficulties Ms. Koyle was encountering. Tr. 315-16. Mr. Whitman made no examination of Ms. Koyle's credit history. Tr. 313-14. Mr. Whitman did not ask Ms. Koyle for her financial statement. Tr. 331. At hearing, Mr. Whitman could not name the position which Ms. Koyle held at the time, but only knew that she was in sales management at Mary Kay Cosmetics. Tr. 331-32. Mr. Whitman could not even recall what other positions Ms. Koyle has held. Nevertheless, Mr. Whitman testified that he had enough information to make a favorable judgement about her character. *Id.*

26. Ms. Koyle was the only person that Mr. Whitman has seriously discussed entering an application with. Tr. 298. Mr. Whitman could not recall talking to anyone else concerning the Pleasant Hope allotment. Tr. 297.

27. Ms. Koyle is a mother of seven children ages five, nine, twelve, fourteen, fifteen, eighteen and twenty. Tr. 187. She has never been employed at a broadcast station and has never done volunteer work at a broadcast station. Tr. 144. She did not study broadcasting. Tr. 144. Indeed, Ms. Koyle has never been involved in a business venture that would require as much money as the proposed station. Tr. 156. Ms. Koyle has not been involved in a business that would require one-third as much money as the proposed station. Tr. 156-58.

28. Although Mr. Whitman does not recall specific discussions with Ms. Koyle regarding the application process, Ms. Koyle testified that he provided her with an indication of what transpires during the allotment and application process and explained to her the FCC's comparative hearing process. Tr. 145. After the first discussion between Mr. Whitman and Ms. Koyle concerning the FCC's allotment process, Mr. Whitman expressed an interest in investing in the Pleasant Hope allotment in conjunction with Ms. Koyle. Shortly thereafter, Mr. Whitman informed Ms. Koyle that he would provide all the money necessary to complete the FCC process. Tr. 145, 295-96.

29. Mr. Whitman suggested that Ms. Koyle contact communications counsel, Mr. Corbett. Tr. 148-49. Mr. Corbett represents Mr. Whitman's employer. Tr. 337. Mr. Whitman testified that he did not recall whether, after suggesting Mr. Corbett as counsel, he called Mr. Corbett to inform him that Ms. Koyle may contact him. Tr. 340. When Ms. Koyle contacted Mr. Corbett, Ms. Koyle and Mr. Whitman had decided to go forward with an application for the Pleasant Hope allotment. Tr. 147.

30. After Mr. Whitman contacted Mr. Corbett regarding Ms. Koyle, Mr. Whitman engaged in perhaps as many as 20 separate conversations with Mr. Corbett. Tr. 338-40. Some of the conversations pertained to preparations for depositions, document production, and filings related to the instant proceeding. Tr. 338-40.

31. Mr. Whitman could not recall whether there had been any discussion regarding the form the applicant would take and does not know who came up with the idea of a corporation. Tr. 297, 301. Ms Koyle testified that Mr. Corbett suggested the formation of a corporation. Tr. 146. Mr. Whitman testified that he did not know who suggested voting and non-voting stock. Tr. 301. The idea of filing as a corporation was not Koyle's and by the time Koyle contacted Corbett, it had already been decided that Koyle and Whitman would file an application and that Whitman would not have a role in management. Tr. 146, 150.

32. Koyle's articles of incorporation were drafted, reviewed and signed less than 25 days after Ms. Koyle's initial meeting with Mr. Whitman. Tr. 138. Koyle's application was filed less than six weeks after the initial meeting. Tr. 138. Mr. Peebles, the secretary of Koyle, together with Mr. Corbett, prepared Koyle's articles of incorporation and bylaws. Tr. 202-203. Ms. Koyle had no role in drafting these documents. Tr. 203. Mr. Whitman paid for Mr. Peebles' services. Tr. 203.

33. Ms. Koyle's total contribution to Koyle is $2,000, $1,800 of which was used to pay the filing fee for the application; she has no other financial obligation to Koyle. Tr. 179; 158-59; 182-83; 310. Ms. Koyle testified that she has no legal obligation to make any contributions to Koyle. Tr. 180.

34. Mr. Whitman paid $8,000 to Koyle Broadcasting for his initial stock in Koyle Broadcasting. Tr. 151-52. This money was used to pay the $6,000 hearing fee for Koyle Broadcasting. Tr. 182-83. Mr. Whitman has provided all additional money necessary to pay the expenses of prosecuting the application. Tr. 151-52. Mr. Whitman testified that he informed Ms. Koyle that he was willing to provide the balance of the funds to prosecute the application. Tr. 303. Mr. Whitman paid for the consulting engineer's services and for all accounting services. Tr. 203. Mr. Whitman testified that, other than the $10,000, Koyle is obtaining all necessary funds through loans from Mr. Whitman. Tr. 335. Ms. Koyle has no personal obligation to repay these loans. Tr. 310.

35. There is no specified point of repayment of the loans to Koyle. Tr. 336. Mr. Whitman testified that it is his understanding and intention in making the loans that should Koyle be successful in obtaining a grant, and if Koyle then becomes profitable and can make payments toward the loan, that he would expect Koyle to make such payments on the loan. In the event Koyle is unsuccessful, Mr. Whitman testified he will lose the repayment of those loans. *Id.*

36. Mr. Whitman made the initial contact with First Financial Federal Savings in Eldora, Arkansas, the financial institution which Koyle relies on for its financial certification. Tr. 303. Specifically, Mr. Whitman contacted Mr. Bullard, the financial officer at First Financial. Tr. 304. Mr. Whitman had a previous banking relationship with First Financial and had known Mr. Bullard for perhaps a year or two. Tr. 304, 307. Mr. Whitman suggested to Ms. Koyle that she contact Mr. Bullard. Tr. 306, 153. Mr. Whitman told Mr. Bullard to expect a telephone call from Ms. Koyle. Tr. 307. Ms. Koyle testified that she had never previously done business with First Financial and relied on Mr. Whitman for his financial backing. Tr. 153.

37. Ms. Koyle contacted Mr. Bullard by telephone, but she never actually met him in person. Tr. 152-153. The only document Ms. Koyle recalled forwarding to Mr. Bullard was a draft letter prepared by Mr. Corbett. Tr. 183. Ms. Koyle testified that she did not recall providing Mr. Bullard with any budget figures. Tr. 184. Mr. Whitman testified that Mr. Bullard was provided with Mr. Whitman's financial statement in connection with the Pleasant Hope application. Tr. 305-306. Mr. Whitman further testified that no other documents were provided to Mr. Bullard. Tr. 305-306. Mr. Whitman does not recall

discussing with Mr. Bullard what would be necessary in order to obtain financing or reasonable assurance of financing for the proposed station. Tr. 307. After Mr. Whitman's initial contact with Mr. Bullard regarding Koyle's application, Mr. Whitman has engaged in subsequent discussions with Mr. Bullard with respect to Koyle's application. Tr. 344-45.

38. Ms. Koyle informed Mr. Whitman that she received from First Financial a letter regarding reasonable assurance of financing. Tr. 156. Mr. Whitman reviewed this letter. Tr. 309. Mr. Whitman, however, testified that prior to reviewing the letter, he was already aware that Koyle had reasonable assurances from First Financial. Tr. 309.

39. Ms. Koyle retained the consulting engineering firm of Reuben Berdnarec & Assoc. because it was recommended to her by Mr. Corbett. Tr. 197.

40. Koyle Broadcasting Co.'s Articles of Incorporation were amended on February 26, 1988. Tr. 161; Williams' Ex. 8. The Amended Articles of Incorporation provided Mr. Whitman with the power to veto any withdrawal, merger, or dismissal of Koyle's application. Tr. 162; Williams' Ex. 8. Mr. Corbett initiated the amendment to Koyle's Articles of Incorporation. Tr. 162-64.

41. Ms. Koyle testified that she had one or two conversations with Mr. Whitman concerning the issue of settlement. Tr. 186-87. Mr. Whitman also testified that he has been involved in settlement discussions with Ms. Koyle concerning the other applicants in the above-captioned proceeding. Tr. 342.

42. Mr. Whitman holds a construction permit for a new FM broadcast station at Lowell, Arkansas.

43. If its application is granted, Koyle will install emergency power generators at the studio and at the transmitter site of its proposed station to ensure that the station will be able to remain on the air in the event of a public utility power failure. Koyle Exhibit No. 2.

Minorities Broadcasting

44. Minorities is a Missouri corporation. Minorities Exh. 1 at 1. William E. White owns 40 percent of the stock and is the Chairman of Minorities. Johnny Roland owns 40 percent of the stock and is the President and a Director of Minorities. Bettie J. Williams owns 20 percent of the stock and is the Secretary/Treasurer and a Director of Minorities. As of the date of the hearing in this proceeding, no stock certificates for Minorities had been issued. Tr. 450.

45. Minorities' three shareholders each own 20 percent of the stock of Bronco Broadcasting Company, Inc. ("Bronco"), the licensee of Station KIRL(AM), St. Charles, Missouri. Mr. White is Chairman of Bronco, Mr. Roland is President of Bronco and Ms. Williams is Treasurer of Bronco. Minorities Exh. 2 at 1. St. Charles, Missouri is approximately 174 miles from Pleasant Hope. *Id.* Mr. White is also a 40 percent shareholder and officer of J&W Promotions, Inc., licensee of Station WAPZ(AM), Wetumpka, Alabama. *Id.* Wetumpka is approximately 525 miles from Pleasant Hope. *Id.* at 2.

46. Mr. White has been the General Manager of Station KIRL(AM), St. Charles, Missouri since January, 1980. Minorities Exh. 4 at 2. During the past year, Mr. White spent approximately three months in Wetumpka, Alabama, on matters related to WAPZ(AM). *Id.* at 4. In the event that Minorities' application is granted, Mr. White will continue to serve as a General Manager at KIRL and maintain his involvement with WAPZ. *Id.* at 4-5. Presently, Mr. White has no plans to sell either KIRL(AM) or WAPZ(AM). Tr. 360. Currently, on Monday through Friday, Mr. White works from approximately 8:30 a.m. to 6:00 p.m. on matters dealing with either KIRL or WAPZ, including selling advertising. Tr. 382-384. Mr. White typically spends from 12:00 to 7:00 p.m. on Saturday and 6:00 to 11:00 a.m. on Sunday at Station KIRL. Tr. 382, 408. Mr. White expects to spend approximately 10 to 12 weeks per year in Wetumpka, Alabama in the future. Tr. 378-79.

47. Mr. White spends approximately five to six hours per month on all of his civic activities, although during some months he spends 12 hours per month on civic activities. Tr. 385-86. He is the Business Manager for the O'Neal Twins and Interfaith Choir. Minorities Exh. 4 at 3. In this position, he has promoted the group for 4 to 5 special events during the past year, spending approximately 8 to 10 hours per event. Tr. 392-95. Mr. White spends approximately 2 to 3 hours per month in connection with the National Black Republican Council. Tr. 399. He spends approximately 10 hours per year visiting juvenile centers in his capacity as a member of the Juvenile Detention Board. Tr. 404, 406.

48. In addition to his duties at KIRL and WAPZ, Mr. White proposes to work part time, a minimum of 20 hours per week at the proposed Pleasant Hope station, generally assisting the station's general manager, with specific emphasis on sales. Minorities Exh. 4 at 4. Although Mr. White does not propose to move to the Pleasant Hope area, he plans to be in Pleasant Hope on a Thursday and Friday, stay over the weekend through Monday or Tuesday, come back to St. Louis for an entire week and go back to Pleasant Hope the following week. *Id.* at 5; Tr. 360. He plans to drive to Pleasant Hope from St. Louis, a trip that takes 4 1/2 to 5 hours each way, and to make approximately 26 trips to Pleasant Hope per year. Tr. 409-10.

49. Mr. White is a black male. Minorities Exh. 4 at 5.

50. White ran for a seat in the United States House of Representative for the First Congressional District of Missouri, in which Pleasant Hope is located, in 1978, 1980, and 1982. Minorities Ex. 4 at 2. White was a delegate to the National Republican Convention in 1980. White has been Chairman of the Missouri chapter of the National Black Republican Council since 1982. *Id.* at 2-3; Tr. 391. The Missouri chapter of the National Black Republican Council meets in Jefferson City or St. Louis. Tr. 403. It does not have meetings each month but rather calls meetings if there is a seminar of some type scheduled for a particular time of year. Tr. 399.

51. In 1979, White was chairman of the First Congressional District Reagan for President, Bush for Vice-President. Minorities Ex. 4 at 3. During President Bush's presidential campaign, White spoke for him at about five dinners. Tr. 402-03.

52. In 1984, White worked on the Committee to Elect John Ashcroft Governor of Missouri. Minorities Ex. 4 at 3. White spends about two to three hours per month on all of his political activities combined. Tr. 399-400. He does not anticipate that this amount of time will increase in the coming year despite the fact that 1990 is a congressional election year. Tr. 404.

53. White has been a member of the Newstead Avenue Baptist Church for 45 years and is an ordained Baptist deacon. Minorities Ex. 4 at 3; Tr. 391. White also has

served as Chairman of the Trustee Board at this church. Minorities Ex. 4 at 3; Tr. 391. He completed his term at the beginning of 1990. Tr. 391. White's church is located in St. Louis. Tr. 409.

54. White is a member of the Webster Groves High School Booster Club, a member of the Webster Groves High School Secondary Educational Advisory Committee, and former president of Schall Elementary School PTA. Minorities Ex. 4 at 3. Webster Groves is located approximately 15 miles outside the city of St. Louis, and Schall Elementary School is in the same area. Tr. 364.

55. White is a member of national chapter of the NAACP. Minorities Ex. 4 at 3; Tr. 365. *Id.* White was appointed to the Manpower Planning and Training Council for St. Louis County by Supervisor Gene McNary and to the State Committee of Citizens Advisory Commission on Malpractice by then Attorney-General John Ashcroft. Minorities Ex. 4 at 3. White was named Businessman of the Year by the Elks Lodge in the St. Louis area. *Id.*; Tr. 371-72.

56. White served on the Salvation Army Board from 1984 through 1987 and on the Women's Self-Help Board from 1981 through 1986. Minorities Ex. 4 at 3-4; Tr. 390. The Salvation Army Board and the Women's Self-Help Board are Missouri-wide organizations, but White served in the St. Louis area. Tr. 372. White terminated his active involvement with both organizations in the fall of 1989. Tr. 390.

57. White spends about one week per year with the Armed Forces Plan for Business and Employment. Tr. 373-74. He is a board member of the Juvenile Detention Board. Tr. 405.

58. White acts as business manager for the O'Neal Twins and the Interfaith Choir. Minorities Ex. 4 at 3; Tr. 392. The O'Neal Twins and the Interfaith Choir are part of one organization. Tr. 392-93. The Interfaith Choir is based in St. Louis and has performed in various places in the country. Tr. 363. The O'Neal Twins have performed in the Springfield area. *Id.* White's responsibilities are to see that the artists get paid, either from the collection taken up at a church service or from the promotion, and to make sure that everything is coordinated and well-run. Tr. 393-94.

59. White is a board member of the National Gospel Workshop of America and is a board member of the National Gospel Evangelist Musicians and Choral Organization. Minorities Ex. 4 at 3. The National Gospel Workshop of America has a chapter in Springfield which is a part of the St. Louis chapter. Tr. 363-64. White is treasurer of the St. Louis chapter. *Id.*

60. Ms. Williams is currently employed as a school teacher in the St. Louis school system. Minorities Exh. 3 at 1. She also works approximately eight to nine hours a week at KIRL(AM) helping with the bookkeeping and payroll. Tr. 436, 446; Minorities Exh. 3 at 2. In the event that Minorities' application is granted, she will resign her teaching job and her involvement with KIRL. Minorities Exh. 3 at 2. Ms. Williams proposes to work full-time as General Manager of the proposed Pleasant Hope station, exercising management authority and responsibility over all aspects of station operation. *Id.* at 1. If the application is granted, she will move to Springfield, Missouri. Tr. 430.

61. Ms. Williams' involvement in the preparation of Minorities' application consisted of being "present during the general discussions formulating the plan, and part of the time when the secretary wrote it up." Tr. 427. She played no part in: preparing the Equal Employment Opportunity Program for the station, ascertaining that Minorities would be financially qualified to construct and operate the station, locating a transmitter site, contacting or retaining legal counsel, contacting an engineer, or arranging for Public Notice of the filing of the application. Tr. 427-28. She had no contact with Minorities' communications counsel, corporate counsel or engineer concerning the application. Tr. 448. At hearing, Ms. Williams testified that she believes that the public inspection file for Minorities' application is located in Mr. White's office in St. Charles, Missouri. Tr. 448.

62. Mr. White set up the Minorities checking account. Tr. 429. Ms. Williams is authorized to sign checks for Minorities, but has not signed any. Tr. 449. She has not signed any corporate documents. Tr. 449-50. Although her signature appears on Minorities' Articles of Incorporation, she did not place it there. Mr. White signed it for her. Tr. 370, 433; PHBC Exh. 5.

63. Ms. Williams did not sign Minorities Exhibit 3 on December 23, 1989 when she signed other direct exhibits exchanged by Minorities because she wanted corrections made in it. Tr. 425. Mr. White signed Ms. Williams name on the exhibit without the corrections Ms. Williams requested having been made. Tr. 439-440; 451.

64. Ms. Williams is a black female. Minorities Exh. 3 at 2.

65. Williams is a member of the Missouri and National chapters of the NAACP. Minorities Ex. 3 at 2. Williams also has participated in the National Black Republican Council. Minorities Ex. 3 at 2; Tr. 432. Generally, Williams is active with the organization only during election years and election campaigns. Tr. 432-433. She estimates that during the busy period of October and early November in an election year, she may spend three of four hours per month on National Black Republican Council activities. *Id.*

66. Williams also is a member of the American Federation of Teachers and of the Gospel Music Workshop of America. Minorities Ex. 3 at 3. Additionally, she is a member and choir director of the Interfaith Choir Board in St. Louis and is a director of and teaches at the St. Louis branch of the YMCA. *Id.* Williams is a member of the Pleasant Green Baptist Church and is choir director there. *Id.*

67. Williams is a 20 percent stockholder and secretary-treasurer of Bronco Broadcasting, Inc. and was involved in Bronco's acquisition of KIRL(AM) in 1979-80. *Id.* at 1; Tr. 435-36. Williams was a part of the board of directors that decided the format for KIRL, but she is not involved with the programming on a day-to-day basis. Tr. 445. Since 1983, Williams has assisted with bookkeeping and general operation at KIRL. Minorities Ex. 3 at 2. She currently does the payroll and signs checks. Tr. 436. She estimates that she spends about eight to nine hours per week dealing with matters involving the day-to-day operations of the station. Tr. 446. During the summer, when she is not working for the Board of Education, Williams works at KIRL longer, averaging 20 hours per week or more. *Id.* In the past, Williams has done the bookkeeping, has swept the floors has cut commercials, and has put records on carts. Tr. 436-37. She also was a disk jockey on a Saturday night program for about six months. Minor-

ities Ex. 3 at 2; Tr. 437. Should Minorities' application be granted, Williams has pledged to leave her current employment with KIRL. Minorities Ex. 3 at 2.

68. In the event of a grant of its application, Minorities will install standby power generation equipment at both the transmitter and studio sites. Minorities Exh. 5 at 1.

Multicom Broadcasting

69. Multicom Broadcasting, Inc. ("Multicom") is a Texas corporation. Multicom Exh. 1 at 1. Carolyn G. Vance owns 66 percent of the stock and is the President and a Director of Multicom. *Id.* Ben D. Downs is the Vice-President and a Director of Multicom. *Id.* William R. Vance, Jr. owns 34 percent of the stock and is the Secretary, Treasurer and a Director of Multicom. *Id.*

70. Multicom is the licensee of Broadcast Stations KEEE(AM) and KJCS(AM), Nacogdoches, Texas. Multicom Exh. 2 at 1. KEEE is licensed to operate full-time on 1230 khz, with 1 kw ERP. KJCS is licensed to operate on 103.3 mHz, with 100 kW ERP. Ben D. Downs is General Manager of Stations KEEE and KJCS. *Id.* Nacogdoches is located approximately 350 miles by air from Pleasant Hope. *Id.* Multicom is the permittee of Broadcast Station KPFX(FM), Killeen, Texas. *Id.* KPFX will be authorized to operate at 3.6 kW ERP. Killeen is located approximately 450 miles from Pleasant Hope. *Id.* On December 1, 1989, Multicom began managing Broadcast Stations WTAW(AM) and KTSR(FM), Bryan-College Station, Texas, pursuant to a mangement agreement with Hicks Broadcasting Corporation. *Id.* Ben D. Downs is the General Manager of Stations WTAW and KTSR. *Id.* College Station is located approximately 450 miles from Pleasant Hope. *Id.*

71. Carolyn G. Vance, Ben D. Downs and Williams R. Vance, Jr. are the officers, directors and shareholders of Tyler Broadcasting Co., Inc. *Id.* at 2. Tyler Broadcasting is the licensee of Broadcast Station KISX(FM), Whitehouse, Texas. *Id.* Mr. Downs is the General Manager of KISX. *Id.* Whitehouse is located approximately 350 miles from Pleasant Hope. *Id.*

72. No owner of Multicom will integrate into management of Multicom's proposed Pleasant Hope station. Multicom Exh. 3 at 1.

73. In the event that its application is granted, Multicom will install auxiliary power generators at both the studio and transmitter locations of the proposed Pleasant Hope station. Multicom Exh. 4 at 1.

74. Multicom proposes no integration, and therefore is entitled to no integration credit.

75. None of its media interests is located closer than 350 miles from Pleasant Hope, and none is located within the state of Missouri. Hence, although all of these radio interests are attributable to Multicom, they require a less significant demerit than would interests in the same state or community. *Royce International Broadcasting*, 66 RR 2d 1746 (Rev. Bd. 1989). Multicom merits a slight-to-moderate diversification demerit. It receives a very slight preference for its proposal to utilize auxiliary power.

III. CONCLUSIONS OF LAW

Comparative Coverage

None of the applicants will provide service to underserved areas during daylight hours. During daylight operation, the following are the total area and population which each of the applicants will cover with its 1mV/m contour.

TOTAL

Applicant	Sq. Km. Area	Population
Pleasant Hope Broadcasting Company (Pleasant Hope)	8469	269,803
Koyle Broadcasting (Koyle)	8542	266,709
Minorities Broadcasting Co. of Missouri (Minorities)	8522	274,937
Multicom Broadcasting, Inc. (Multicom)	8496	276,436

The following are the areas and populations each of the applicants will serve during the evening hours.

Area in Sq. Km.

Service

	2nd	3rd	4th	5th	Total
Pleasant Hope	30	192	112	319	8,469
Koyle	115	249	459	308	8,542
Minorities	15	198	362	472	8,522
Multicom	0	20	48	242	8,496

Population

Service

	2nd	3rd	4th	5th	Total
Pleasant Hope	155	751	645	1736	269,803
Koyle	596	1050	3090	1465	266,709
Minorities	127	869	2318	4483	274,937
Multicom	0	57	337	3306	276,436

IV. CONCLUSIONS OF LAW

Comparative Coverage

76. When areas and populations are well-served, the Commission has awarded a slight coverage preference to applicants proposing substantially greater overall coverage than their opponents. *Simon Geller*, 90 FCC 2d 268-69, 276 (1982) (subsequent history omitted) (coverage superiority of four times more area and 315,000 persons). Where the differences are insignificant, no preference is awarded. *Susan S. Mulkey*, 4 FCC Rcd 5520, 5521 (1989) (coverage difference of 36,206 persons of 2%); *Barnes*

Enterprises, Inc., 69 FCC 2d 1057, 1962-63 (Rev. Bd. 1978), *review denied*, FCC 79-451, released July 15, 1979 (coverage difference of 12,000 persons or 5%).

77. In the instant case, each of the applicants proposes similar service. During the day and at night, each of the applicants will serve over a quarter of a million persons. The difference in total populations which would be served by each of the applicants is less than 10,000. At night there are differences in service to underserved areas. These differences, however, are slight when compared to the total service each of the applicants proposes. Thus, during nighttime hours, the difference among the applicants in the provision of a second service is less than 600 persons. In the provision of third through fifth service, the populations differ by only a few thousand. Given the similarities in overall service, and the fact that the slight differences among the applicants in service to underserved areas occurs only at night, none of the applicants receives a preference under the coverage aspect of the comparative issue.

Pleasant Hope

78. PHBC will receive 60 percent quantitative integration credit for the proposal of Mr. Mitchell to work at the station full-time as the general manager. No limited partnership existed until after this proceeding was designated for hearing. PHBC's application reflected that two persons not proposed to be integrated, Noel Boyd and Paula Landers, each would hold 20 percent of the applicant's votes. PHBC did not attempt to amend that representation in the application until after designation. An applicant cannot improve its comparative position by amending its partnership agreement after the date for filing, amendments as of right. *Payne Communications, Inc.*, 1 FCC Rcd. 1052 (rev. Bd. 1986). No written partnership agreement existed until after hearing designation. Prior to August 1989, the principals had no discussions whatsoever about the legal limitations on limited partners which are now found in PHBC's August 11, 1989 limited partnership agreement (*e.g.*, whether limited partners could act as employees, vote on the removal of a general partner, or communicate with the general partner, or communicate with the general partner on matters pertaining to the day-to-day operation of the proposed station). Clearly, PHBC cannot claim any of the insulating factors existed as of the date for amendments as of right. As a result, Landers' and Boyd's voting ownership interests are to be factored into the integration analysis. Since Landers is no longer part of PHBC and Boyd has not proposed to be integrated, PHBC will receive 60 percent quantitative integration credit.

79. Mr. Mitchell's integration proposal is substantially enhanced by Mitchell's past and proposed future residence in the service area and his civic activities in and near Pleasant Hope. The proposal is slightly enhanced by Mr. Mitchell's broadcast experience.

Koyle Broadcasting Corporation

80. The totality of the evidence points to the conclusion that 80% non-voting stockholder Douglas R. Whitman is not a "passive" investor in Koyle. What Koyle presents is this: veteran broadcaster Whitman plans to turn over to Karleen Koyle, a person whom he met only as the result of his search for another party to an application, whom he knows to have never worked in broadcasting before, whom he knows to have had financial difficulties, and who will have limited personal financial risk, the entire operation of the proposed new station without further involvement by Whitman. On the evidence, the unliklihood of it all is striking, and Koyle's integration proposal will not be credited.

81. At the time he net Koyle, Whitman had recently filed an application for a new FM station at Lowell, Arkansas, and he did not wish to diminish his chances in that proceeding by having an attributable interest elsewhere. He joined Karleen Koyle who could act as a front person for an applicant.

82. Ms. Koyle did not recall whether she ever discussed the structure of the applicant with Whitman, but admits that by the time she contacted communications counsel, the decision to go forward with an application had already been made and the applicant's basic structure was set.

83. Whitman appears to have been rather unconcerned about whether Ms. Koyle's background would enable her to be successful in managing the proposed radio station. Whitman was aware that Koyle had had no broadcast experience, and that she had recent financial difficulties. Whitman could not name the position which Ms. Koyle held at the time, but only knew that she was in sales management at Mary Kay Cosmetics. Knowing that Ms. Koyle had financial difficulties, Whitman nevertheless did not ask her for her financial statement or make any examination of her credit history.

84. Whitman is the only party to the Koyle Broadcasting application who stands to lose any substantial sum of money. Ms. Koyle has only a small investment of $2,000 in the applicant, and she has no further financial obligation to the applicant. In contrast, Whitman's initial investment was $8,000, and Whitman told Ms. Koyle that he would furnish all of the remaining funds needed for the prosecution of the application. Whitman expects no repayment of these funds if Koyle Broadcasting's application is not granted, and he is prepared to risk the loss of these sums.

85. Ms. Koyle has no experience at all in broadcasting. Also, she has never been involved in any type of business venture that would require as much money, or even a third as much money, as would be required to go through the Commission's processes, build a station, and operate it for three months. Whitman, in contrast, is an experienced broadcaster who has been in the business his entire adult life. Whitman is also a shareholder in the permittee for a new FM station at Lowell, Arkansas. It is simply not credible that an experienced broadcaster such as Whitman would be content to watch passively while someone with no broadcast experience whatsoever attempted to manage a station in which he alone had a substantial financial investment.

86. Koyle did contact Koyle Broadcasting's communications counsel, Dennis Corbett, but Whitman had given her Corbett's name and told her that she should do so. Furthermore, Whitman has communicated with communications counsel concerning Koyle Broadcasting's application approximately 20 times since he became involved in the applicant.

87. Whitman chose and made the first contact with the financial institution upon which Koyle Broadcasting relies for its financial certification. Whitman had money on deposit at the bank and had previously borrowed funds there. He had known the banker whom he called for a

year or two, and provided the banker with his current financial statement in connection with the Pleasant Hope application. In contrast, Ms. Koyle had no prior relationship with the bank and did not provide the banker with any personal financial information.

88. The record reflects little significant activity by Ms. Koyle in connection with the application. Whitman's hand, however, is visible throughout the process. He sought out someone to act as a front person while he theoretically remained in the background. He is now asking the Commission to believe that he decided to turn over a substantial investment to the control of someone who was almost a complete stranger, who had no broadcast experience, and who had suffered recent financial problems. Furthermore, it was Whitman who chose the source of financing for the construction and operation of the proposed station, and it was he who chose the communications counsel who would prosecute the application. Finally, Whitman is the only party with any substantial financial stake in the applicant. Whitman is the party actually in control of Koyle Broadcasting, and he will remain in control to protect his sizable investment. Ms. Koyle is not likely to exercise any real authority over the applicant. Koyle Broadcasting is awarded 20 percent quantitative integration credit for Ms. Koyle's proposed participation.

89. Ms. Koyle's integration is substantially enhanced because she is a female, moderately enhanced by her residence within the proposed service area since 1984, and her participation in service area civic activities enhances the proposal to a slight-to-moderate degree.

Minorities Broadcasting

90. William White, a 40 percent shareholder in Minorities, must be denied integration credit because he has not met his burden of demonstrating a reasonable liklihood that he will effectuate his proposal to work a minimum of 20 hours per week at the proposed station. *Stanley Group Broadcasting, Inc.*, 3 FCC Rcd 5017 (Rev. Bd. 1988).

91. The record evidence does not support a finding that Mr. White will actually devote at least twenty hours per week to the affairs of the proposed station. He is presently working as the General Manager of Station KIRL(AM) and an officer of J&W promotions, the licensee of Station WAPZ(AM). He does not propose to divest his position with either station in the event Minorities' application is granted. That Mr. White expects to spend a total of approximately 10 to 12 weeks in Wetumpka, Alabama in the future discredits his specific proposal to spend several days at the Pleasant Hope station every other week. *See High Sierra Broadcasting, Inc.*, 96 F.C.C. 2d 423, 424 (Rev. Bd. 1983) (sporadic part-time integration proposal rejected).

92. Moreover, Mr. White typically spends approximately 47.5 hours Monday through Friday on matters dealing with Stations KIRL or WAPZ, and is at Station KIRL approximately 12 hours on the weekend. In other words, he now spends approximately 60 hours per week working on the affairs of Stations KIRL and WAPZ. Additionally, he spends at least five to six hours per month, (and sometimes more) on his civic activities, and he proposes to drive to or from Pleasant Hope every week, a trip that requires approximately 41/2 to 5 hours.

93. Mr. White has proposed to spend at least 20 hours per week at the Pleasant Hope station, in addition to the approximately 65 hours per week he will spend on KIRL and WAPZ matters, civic affairs, and traveling between Pleasant Hope and his home in St. Louis. His various commitments total over 80 hours every week, a completely unrealistic proposal. In *Berryville Broadcasting Co.*, 70 F.C.C. 2d 1, 11-12 (Rev. Bd. 1978), the Commission rejected an even less ambitious proposal for a 70 hour work week, concluding that the unusually high number of hours of the principal's work week, his division of responsibility among several stations in different communities and the heavy drive time necessary to fulfill the commitment made it extremely unlikely that his integration proposal would be effectuated. Mr. White has failed to meet his burden to demonstrate persuasively how he will implement his proposal to work at least 20 hours per week at the Pleasant Hope station while maintaining his current involvement with KIRL and WAPZ and numerous civic activities. Because the Commission has made clear that 20 hours per week is the cut-off point below which no credit will be given for a part-time integration proposal, under relevant precedent, Mr. White's integration proposal must be rejected.

94. Bettie Williams, Minorities' 20 percent shareholder, has not been materially involved in either the preparation or prosecution of Minorities' application. Although Ms. Williams holds the title of Minorities' Secretary/Treasurer, she has not reviewed or signed corporate documents. She did not open Minorities' checking account and has not signed any checks for the corporation. In fact, although Ms. Williams' signature appears on Minorities Articles of Incorporation, Mr. White actually signed her name to that document. Mr. White also signed Ms. Williams's Direct Testimony (Minorities Exh. 3) for her.

95. Williams played no role in: preparing Minorities EEO Program, ascertaining that Minorities would be financially qualified to construct and operate the proposed station, locating a transmitter site, or arranging for Public Notice of the filing of the application. Ms. Williams had absolutely no contact with Minorities' communication counsel, corporate counsel or engineer concerning the application, and did not retain any of these individuals. She believed that the public inspection file for the proposed Pleasant Hope station was located 175 miles from Pleasant Hope in Mr. White's office in St. Charles, Missouri.

96. In sum, Ms. Williams' role with respect to Minorities, has been completely passive. In light of her non-involvement in and lack of knowledge about the preparation and prosecution of Minorities' application, as well as the management of Minorities' corporate affairs, it is completely unrealistic and unreasonable to conclude that Ms. Williams will effectuate her proposal to work as the general manager of the proposed station, and exercise overall responsibility for all aspects of managing the proposed station. Accordingly, applicable precedent compels that the integration credit Ms. Williams claims must be denied. *Doylan Forney*, 3 FCC Rcd 6330 (Rev. Bd. 1988); *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948 (Rev. Bd.), *recon denied*, FCC 88R-52, released September 23, 1988.

97. If Ms. Williams and Mr. White were entitled to integration credit, Minorities would be entitled to credit for Ms. Williams proposed full-time integration and Mr. White's proposed part-time integration. Using the HHI

index. Minorities would receive a score of 2000 for Ms. Williams' participation -- (100 x (40/40) x .2 = 2000 -- and 1000 for Mr. White, (100 x (20/40) x .4 = 1000. for a total of 3000 points.

98. In the event that Ms. Williams 20 percent integration proposal were credited, it would be substantially enhanced by her minority status, moderately enhanced by her female status, and slightly enhanced by her proposal to move to Springfield, which is within the proposed station's 1 mV/m contour, and by her limited broadcast experience. Mr. White's integration credit would be substantially enhanced by his minority status and slightly enhanced by his past broadcast experience. Mr. White's integration would also bring to Minorities a very slight enhancement for his civic activities in the Springfield area.

99. White, Roland and Williams all hold media interests in other radio stations, resulting in a moderate diversification demerit.

Multicom Broadcasting

100. Multicom propose no integration, and therefore is entitled to no integration credit.

101. None of its media interests is located closer than 350 miles from Pleasant Hope, and none is located within the state of Missouri. Hence, although all of these radio interests are attributable to Multicom, they require a less significant demerit than would interests in the same state or community. *Royce International Broadcasting*, 66 RR 2d 1746 (Rev. Bd. 1989). Multicom merits a slight-to-moderate diversification demerit.

V. ULTIMATE CONCLUSIONS

102. All of the applicants propose the use of auxiliary power, so that none of them receives a preference on that account. Also, no applicant receives a comparative coverage advantage.

103. PHBC is the preferred applicant herein, with 60 percent quantitative integration credit, and no diversification demerit. Next comes Koyle with 20 percent integration credit, and with a slight-to-moderate diversification demerit for the ownership of Mr. Whitman (who is not a truly passive investor in Koyle) of a permit for an FM station in Lowell, Arkansas. Minorities receives no integration credit and is charged with a moderate diversification demerit because its principals all hold interests in other radio stations. Finally, Multicom seeks no integration credit, and is attributed with interests in several radio stations for which a slight-to-moderate diversification demerit is assessed.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or the Commission reviews the decision on its own motion,[2] the application of Pleasant Hope Broadcasting Co., L.P. (File No. BPH-871209MB) IS GRANTED and the applications of Koyle Broadcasting Corporation (File No. BPH-871210MD), Minorities Broadcasting Company of Missouri, Inc. (File No. BPH-871210ME), and Multicom Broadcasting (File No. BPH-871210MF) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] With respect to the limited partners, Article 3 of the written agreement provides as follows:

> No limited partner may act as an employee of the partnership if [his] or her functions relate, directly or indirectly to, the media enterprises of the partnership.
>
> No limited partner may serve, in any material capacity, as an independent contractor or agent with respect to the limited partnership's media enterprises.
>
> In the event a limited partner may be permittee to vote on the admission of additional general partners, the general partner may veto all such proposed admissions.
>
> A limited partner may vote on the removal of a general partner only: (i) where the general partner is subject to bankruptcy proceedings, (ii) where the general partner is adjudicated incompetent by a court of competent jurisdicition or (iii) upon a finding by an independent party that the general partner has engaged in Malfeasance, criminal conduct or wanton or willfull neglect.
>
> All limited partners are barred from performing any services to the limited partnership materially relating to its media activities, with exception of making loans to or acting as a surety for the business.
>
> All limited partners are expressly prohibited from becoming actively involved in the management or operation of the media businesses of the partnership.

[2] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 29, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMHERST TELEPHONE COMPANY PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On March 4, 1991, the Amherst Telephone Company (Amherst) filed a petition for waiver of the equal access implementation requirements for independent telephone companies. Amherst requests an additional one and one-half years to complete the conversion of its end offices to equal access. Amherst states that on July 12, 1990, it received a letter from MCI Telecommunications Corporation (MCI) requesting that Amherst convert its end offices to equal access. Pursuant to Commission order, Amherst is required to complete the equal access conversion of end offices equipped with stored program controlled (SPC) switches within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985). The three-year time period will end July 12, 1993. Amherst seeks an additional one and one-half years, until January 1, 1995, to complete its equal access conversion.

Amherst states that its existing ITT switching system is nearing the end of both its useful life and its depreciable service life, and that the software and hardware upgrades necessary for equal access implementation would be costly. Amherst argues that it would be more reasonable to convert to equal access when it replaces its switching system. According to Amherst, the additional time requested will permit Amherst to: seek bids on the new system; order the new system; and obtain, install, and test the equipment. Amherst adds that MCI does not object to the new dates.

Interested parties should file comments on the petitions by **April 15, 1991,** and reply comments by **April 25, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petitions can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Telephone Company
of Indiana and United Telephone
Company of Ohio

Request for Waiver of the
Commission's Equal Access
Implementation Plan for Independent
Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: March 19, 1991; Released: March 28, 1991

By the Chief, Common Carrier Bureau

I. INTRODUCTION

1. In this order, we deny a Request for Waiver (Request) of the Commission's equal access rules filed by United Telephone Company of Indiana and United Telephone Company of Ohio (United). We also find that United is required to convert it send offices serviced by stored program controlled switches by June 26, 1992.

II. BACKGROUND

2. In the *ITC Equal Access Order*,[1] the Commission required the non-GTE independent telephone companies (ITCs) to convert their end offices to equal access only if certain conditions were present. That order also established a timetable for conversion under certain circumstances. Strict timetables for conversion had been imposed upon the Bell Operating Companies (BOCs) under the Modification of Final Judgment (MFJ),[2] and upon the GTE operating companies (GTOCs) under the GTE Consent Decree.[3] The Commission recognized differences between the BOCs and the GTOCs on the one hand, and the non-GTE ITCs on the other, with respect to the types of markets served, switching technologies employed, and financial resources available to undertake equal access conversion. Because of these differences, the Commission concluded that the timetables of the type imposed upon the BOCs and the GTOCs would not be appropriate for the non-GTE ITCs.

3. Instead, the Commission required these ITCs to convert end offices equipped with stored program controlled (SPC) switches within three years of a "reasonable request" for conversion to equal access by an interexchange carrier. The Commission directed the non-GTE ITCs to convert end offices with electromechanical switches as soon as practical but did not specify a timetable.[4] Moreover, the *ITC Equal Access Order* provided that the non-GTE ITCs may seek a waiver of the Commission's rules if such a carrier can "demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[5]

III. PLEADINGS

4. United filed its Request on November 30, 1990. United states that on March 15, 1988, MCI Telecommunications Corporation (MCI) requested that United accelerate its schedule for converting end offices to equal access. United states that MCI subsequently claimed that this request was a "reasonable request" within the meaning of the *ITC Equal Access Order*, and that under the requirements of that order United is required to complete equal access conversion of United's SPC switches by March 1991. United states that it will not be able to complete the equal access conversion by March 1991.

5. United argues first that the March 15, 1988 letter from MCI was not a reasonable request for equal access conversion. United states that in its letter, MCI requested, after examining United's equal access conversion schedules, that United: (a) advance the conversion dates of the 12 offices scheduled for conversion after December 31, 1988; and (b) convert 108 offices that were not scheduled for equal access conversion. United states that on May 26, 1988, it wrote a letter asking MCI to clarify whether MCI intended its March 15 letter as a reasonable request for conversion to equal access. United states that on June 26, 1989, after a delay of one year, MCI sent a letter to United stating that MCI's March 15, 1988 letter did constitute a reasonable request for conversion, and that the conversion deadline should be March 15, 1991. Subsequently, according to United, MCI and United representatives orally agreed in October 1989 that MCI's letter of March 15, 1988 would not trigger equal access obligations on the part of United. United states, however, that at an August 1990 meeting, an MCI representative asked a United representative whether United would meet its March 1991 conversion deadline.

6. United argues in its Request that, regardless of whether the three-year time period began in 1988 or 1989, it would be cost-prohibitive to convert its eighteen SPC-equipped offices.[6] United states that seventeen of these offices are equipped with ITT 1210 switches, which cannot be converted to equal access with software upgrades, but require hardware upgrades as well. United states that the necessary hardware and software will cost approximately $3.06 million. United states that the remaining switch, an NE NX1E, is not equal access capable, and would have to be replaced at a cost of over $1 million. In addition, United argues that the Commission should permit ITCs to convert small offices more slowly because the BOCs and GTOCs were permitted additional time to convert offices withless than 10,000 lines.

7. MCI filed an Opposition to United's waiver request, arguing that United has not shown special circumstances that would warrant a waiver. In its opposition, MCI argues that its March 15, 1988 letter was clear and, therefore, was a reasonable request. MCI contends that United was fully aware of United'sequal access implementation obligations, and sought to delay the equal access implementation process by claiming to be confused. MCI states that it believes that United's problem with the request is that MCI failed to identify which end offices were equipped with SPC switches and which end offices were equipped with electromechanical switches. MCI states that it is not required to identify particular end offices that

must be converted within the three-year timetable, and has no means of identifying those end offices with SPC or electromechanical switches. MCI also disagrees with United's characterization of the conversations regarding the request between the companies'representatives. MCI states that in the conversations, its representatives made it clear that as long as United made progress towards equal access conversion that was satisfactory to MCI, United would not have to seek a waiver from the FCC. MCI states, however, that its representatives assumed that the three-year time period had commenced and would end on June 26, 1992.

8. In addition, MCI disputes United's claim that conversion would be cost-prohibitive. MCI contends that converting the switches will only cost $9.75 per line, and that other independents have managed to convert similar switches within the three-year time frame. MCI also argues that the Commission made the decision in the *ITC Equal Access Order* not to adopt a "10,000 line test" as a threshold for exempting carriers from the equal access requirements. MCI states that United has not offered a schedule for conversion, and that MCI believes that June 26, 1992 is a reasonable date for completion of United's equal access conversion.

9. In its Reply Comments, United assumes a June 26, 1989 request for conversion, and seeks an extension of seven and one half years, until November 1998, to implement equal access.[7] United states that it is in the process of converting to equal access but wants to convert its electromechanical switches, which do not offer the advanced features resident in the ITT 1210s, before converting existing digital switches. United argues that upgrading the ITT 1210 switches now does not make good business sense because the switches are nearing the end of their economic and operational lives and should instead be replaced with more modern switches at a later time.

10. In response to MCI's argument that nine small ITCs have agreed to convert ITT 1210s to equal access under a three year schedule, United contends that these companies are much smaller than United, and none has more than 10 exchanges. United claims that converting its end offices is a more complex and time consuming process because its switches serve over 250 exchanges.

IV. DISCUSSION

11. MCI's March 15, 1988, letter was somewhat ambiguous and considerably less detailed and clear than other letters from MCI that ITCs have viewed as reasonable requests. Given this ambiguity, United's effort to seek clarification, and MCI's extraordinarily slow response, we conclude that June 26, 1989, should be viewed as the starting date for United's conversion period.

12. Based on our review of the record, we conclude that United has not demonstrated that a waiver is justified. In its original Request, United essentially sought an indefinite waiver of the Commission's equal access conversion rules. United asserts that the conversion would cost $4 million, but gives no indication of what percentage of United's total costs this sum might represent, or what effect conversion might have on rates. In assessing the costs and benefits of equal access conversion, United must recognize that Commission policy requires conversion within three years of a reasonable request, and that there is therefore a pre-existing determination that conversion to equal access within three years will benefit the public -- a determination that United is not free to ignore in its business planning. Furthermore, as MCI notes, the *ITC Equal Access Order* rejected a proposal made by some parties to that rulemaking proceeding that end offices with fewer than 10,000 lines be exempted from the equal access requirements. The Commission determined that exemption on the basis of switch technology was more appropriate.[8] In its Reply Comments, United supplies some additional information, but fails to make a showing sufficient to support a waiver, particularly a waiver for this extended time period. MCI has not agreed to United's proposed new completion dates, and has opposed United's request. We are unable to conclude that United has demonstrated that the timetable established by the Commission's rules is not "feasible except at costs that clearly outweigh potential benefits to users."[9]

V. ORDERING CLAUSE

Accordingly, IT IS ORDERED that the petition for waiver of the equal access implementation requirements is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[2] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[3] *United States v. GTE* , 603 F. Supp. 730 (D.D.C. 1984).

[4] *See ITC Equal Access Order* at paras. 48-49.

[5] *Id.* at para. 50.

[6] The United States Telephone Association (USTA) filed comments supporting United's waiver request. USTA states that United has demonstrated that the costs of conversion outweigh any benefits. *See* USTA Comments at 2.

[7] In its Reply Comments, United has included a conversion schedule of implementation dates for its end offices that range from August 1991 to November 1998. *See* United Reply Comments, Attachment A.

[8] *See ITC Equal Access Order*, 100 FCC 2d at 879 n. 56.

[9] *ITC Equal Access Order* at para. 50.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

MULTIMEDIA	8330-MM
ENTERTAINMENT, INC.	C8-276

For Declaratory Ruling

STAFF RULING

Adopted: March 20, 1991; Released: April 1, 1991

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for a declaratory ruling filed July 31, 1990, by Multimedia Entertainment, Inc. (Multimedia),[1] seeking a Commission determination that its "Sally Jessy Raphael" program (SJR) is a "bona fide news interview" program, exempt from the "equal opportunities" provision of Section 315(a) of the Communications Act of 1934, as amended.

2. Multimedia contends that SJR satisfies the criteria the Commission requires for a "bona fide news interview" exemption under Section 315(a)(2). According to Multimedia, SJR is a one-hour syndicated program distributed for broadcast Monday - Friday, to approximately 161 stations nationwide. Multimedia also states that SJR has been broadcast on a regularly scheduled basis since 1984, and that news interviews are regularly scheduled on the program. SJR is filmed before a studio audience and is hosted by broadcast journalist Sally Jessy Raphael. Multimedia asserts that it retains control over the program by selecting all program topics and questions asked interviewees. Further, Multimedia contends that Ms. Raphael's 30 years of experience enables her to control the program's format and questioning by the studio audience so as to avoid the advancement of any candidate. In addition, Multimedia states that all guests are selected on the basis of their expertise or potential audience interest and are not chosen in order to advance the candidacy of a particular person or persons. Finally, Multimedia asserts that with regard to the characteristics listed above, SJR is identical to its "Donahue" program, which the Commission has held to be exempt from the "equal opportunity" provisions of Section 315(a) of the Act.[2]

DISCUSSION

3. Section 315 of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to "use" a broadcast station (an appearance by picture or voice), it must afford equal opportunities to other such candidates for that office. In 1959, Congress, in an effort to encourage increased news coverage of political campaign activity, amended Section 315 to exempt from equal opportunities appearances by legally qualified candidates on the following news programs:

(1) bona fide newscast,
(2) bona fide news interview,
(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
(4) on-the-spot coverage of a bona fide news event (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). In determining whether a program qualifies as a "bona fide news interview", the Commission considers the following factors: (1) whether it is regularly scheduled; (2) whether the broadcaster controls the program; and (3) whether the broadcaster's decisions on the format, content and participants are based on its reasonable, good faith journalistic judgment and newsworthiness rather than on an intention to advance and individual's candidacy. *See U.S. News and World Report, L.P.*, 2 FCC Rcd 7101 (1987).

4. Based on the information contained in Multimedia's request, it appears that the news interview segments of SJR are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2). SJR has been regularly scheduled since 1984. *See Aspen Institute*, 55 FCC 2d 697, 709 (1975). The Commission has recognized that regularly scheduled programs that do not exclusively address current events but which do include "bona fide" news interviews on a regular basis are eligible for the "news interview" exemption.[3] Multimedia represents that news interviews are regularly scheduled on SJR. Multimedia also represents that it retains control over the program's topics and questions asked interviewees and that the program's host is able to control audience participation and program content during the show. Moreover, according to Multimedia, all topics are selected on the basis of newsworthiness in the exercise of the producer's reasonable good faith judgment, with no intent to further any candidacy.

5. In view of the foregoing considerations, we believe that to the extent Multimedia regularly produces, and licensees regularly schedule for broadcast, bona fide news interviews, such program segments containing bona fide news interviews are exempt from Section 315(a) of the Communications Act, and accordingly, Multimedia's instant request as specified above is GRANTED.

6. Staff action is taken here pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

FOOTNOTES

[1] Multimedia is a subsidiary of Multimedia of Ohio, Inc., licensee of WLWT (TV), Cincinnati, Ohio.

[2] *Multimedia Entertainment, Inc.*, 56 RR 2d 143 (1984) ["Donahue"].

[3] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-66

Amendment of Part 90	RM-6146
Concerning Secondary	RM-6361
Fixed Operations in the	
450-470 MHz Band	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 14, 1991; Released: April 1, 1991

By the Commission:

I. INTRODUCTION

1. This Commission has before it two Petitions for Rule Making, one filed by the Special Industrial Radio Service Association (SIRSA Petition),[1] and the other jointly filed by the American Association of State Highway and Transportation Officials (AASHTO), the Associated Public-Safety Communications Officers, Inc. (APCO), and the Forestry Conservation Communications Association (FCCA)(Joint Petition).[2] Both petitions address the interservice frequency coordination requirements for secondary fixed use operations on frequencies in the 450-470 MHz band. Secondary fixed operations in this band are governed by Section 90.261 of the Commission's Rules, 47 C.F.R. § 90.261. The petitions will be considered concurrently in this proceeding.

II. SUMMARY

2. Section 90.261 provides that frequencies in the 450-470 MHz band may be used by licensees for fixed uses on a secondary basis to mobile operations. Section 90.261 designates frequencies that may be assigned to applicants in one service, such as the Public Safety Radio Service, on a secondary basis to land mobile operations in another radio service, such as the Industrial and Land Transportation Radio Services. Frequencies in this band that are available for fixed use in one radio service, therefore, are generally the same frequencies available for mobile use in another radio service. [3] Frequency coordination from more than one coordinator is, consequently, currently required. In fact, Section 90.175 of our Rules, 47 C.F.R. § 90.175, provides that when frequencies are shared by more than one radio service, concurrence must be obtained from the other applicable certified coordinators.

3. SIRSA contends that the multiple coordination requirement is unnecessary. SIRSA argues that because fixed use is authorized only on a secondary, non-interference basis, the applicant should not have to seek coordination from the radio service in which it is eligible as well as the coordinator of the radio service to which the frequencies are assigned for mobile use. SIRSA thus proposes that we amend Section 90.175 to require coordination only by the coordinator of the radio service in which the applicant is eligible. This procedure, argues SIRSA, would reduce processing time and eliminate multiple coordination fees.

4. Conversely, the joint petitioners propose that we amend Section 90.261 to provide for secondary fixed use of the 450-470 MHz frequencies on an "in-service" basis only. Pursuant to this proposal, only eligibles for the primary use of the frequencies would be authorized their use for secondary fixed purposes. The joint petitioners argue that the certified coordinator for the frequencies would then be able to coordinate all secondary use applications without the need to consult with any other coordinator. Additionally, the joint petitioners argue that a waiver of the Rules be required for any interservice sharing of these frequencies. The joint petitioners suggest, however, that existing licensees authorized to use these frequencies on a secondary fixed basis be "grandfathered." Finally, the joint petitioners request employing the use of the 12.5 kHz offset channels listed in Section 90.267 of our Rules, 47 C.F.R. § 90.267, under the provisions of Section 90.261.

5. By this *Notice of Proposed Rule Making*, we propose to amend Section 90.175 to modify the frequency coordination requirements for the secondary fixed use of frequencies now listed in Section 90.261. Specifically, we propose to amend Section 90.175 to provide that use of frequencies in the 450-470 MHz band for secondary fixed purposes will require coordination only by the certified coordinator for the radio service in which the applicant is eligible, hereinafter referred to as the "home" coordinator. The petitions for rule making in this proceeding have also caused us to reexamine other provisions of Section 90.261. Based on this reexamination, we also propose, as suggested by the joint petitioners, to amend Section 90.261 to make available the 450-470 MHz frequencies to "in-service" eligibles for secondary fixed operations. We do not propose to amend Section 90.267 to permit the use of the 12.5 kHz offset channels listed therein under the provisions of Section 90.261 or to limit secondary fixed use to in-service eligibles only.

III. COMMENTS

6. *SIRSA Petition*: SIRSA states that certain applications for use of the Section 90.261 frequencies require concurrence from several frequency coordinators and that the processing of these applications can be time consuming and costly. SIRSA points out that this multiple coordination requirement is imposed even though fixed operations on these frequencies are secondary to primary land mobile operations and must cease if they cause interference to primary users.[4] SIRSA thus argues that full interservice coordination is not needed because fixed operations are secondary. SIRSA therefore proposes that we modify the coordination requirements of Section 90.175 to indicate that the frequencies specified in Section 90.261 require coordination by only the applicant's home coordinator.[5]

7. Brown and Schwaninger supports SIRSA's position. They state that Section 90.261 is not clear with respect to interservice coordination[6] and agree with SIRSA that the practice of awaiting concurrence from coordinators of all radio services to which the frequencies are allocated on a primary basis results in lengthy delays. They also note that the applicant can pay multiple interservice coordination fees in addition to the home coordinator's fee. They argue that the secondary status of the Section 90.261

frequencies provides automatic protection to the primary land mobile use and that additional coordination is of no value. Finally, they suggest that SIRSA's proposal be granted directly, without a notice and comment proceeding.[7]

8. AAR also supports, in part, the SIRSA Petition. AAR states that the coordination requirements for the Section 90.261 frequencies should be simplified. AAR maintains, however, that some interservice coordination is needed to control potential interference. AAR recommends that interservice coordination of the Section 90.261 frequencies be performed by one coordinator who would be designated the representative of all of the services in which the frequencies involved are available for mobile use.[8] API fully supports the SIRSA Petition.

9. APCO opposes the SIRSA Petition but acknowledges that the coordination procedures are in need of revision. APCO states that without cooperation between coordinators, there would be a potential for large scale interference problems. APCO recommends that the Section 90.261 frequencies be used on an "in-service" basis only (i.e., only by eligibles in the particular service that has primary use of the frequencies), which would result in the primary coordinator coordinating both primary and secondary users.[9]

10. *Joint Petition*: The joint petitioners argue that various problems have arisen in the coordination process for secondary fixed use applications, including delays, multiple fees, inefficient assignment of frequencies and interference from secondary use. To alleviate these problems, the joint petitioners take an approach different from SIRSA and request revision of Section 90.261 to provide for secondary fixed use on an "in-service" basis only. The joint petitioners state that, under their proposal, the certified coordinator for primary use of the frequencies would coordinate all secondary fixed use applications, removing the need for any interservice coordination.[10] In conjunction with their proposal, the joint petitioners also argue that a rule waiver should be required for "out-of-service" use of the frequencies. The joint petitioners would, however, grandfather existing Section 90.261 secondary fixed operations until December 31, 1992, or until the license is modified, whichever occurs first.[11] The Joint Petition asserts that the combination of limiting the Section 90.261 frequencies only to eligible users in their own pools and placing the responsibility to coordinate both primary mobile and secondary fixed use of the frequencies in any one radio service solely with the primary coordinator of those frequencies will result in faster, less expensive coordination while minimizing the potential for interference. Finally, the joint petitioners propose that Section 90.267 be amended to employ the 12.5 kHz offset frequencies under the provisions of Section 90.261.[12]

11. API, in opposition to the Joint Petition, states that Section 90.261 sharing arrangements have been successful for twenty years, that the proposed sharing only by waiver is unjustified and overly burdensome, and that Section 90.267 already permits 12.5 kHz offsets for fixed use. API argues that we continue to treat 12.5 kHz offset frequencies differently for fixed purposes because of their limited use due to primary channel operations.[13] SIRSA also opposes the Joint Petition and states that the present system has worked well, that the proposed in-service restriction would be inefficient, that no evidence was presented concerning interference from fixed operations, and that a proper data base would eliminate the problems identified in the Joint Petition.[14] In its comments, NABER states its assumption that Business Radio frequencies are not included in this proceeding.[15] The Reply of Petitioners restates their arguments presented in the Joint Petition.

IV. DISCUSSION

12. Coordination of the Section 90.261 frequencies raises two basic issues. The first relates to the coordination process itself. The second issue concerns reasons why eligibles are restricted from secondary operations on their own frequencies. Each of these issues will be discussed in the following paragraphs.

13. An illustration of a worst case condition under existing coordination procedures pursuant to Section 90.261 is when, for example, a public safety applicant requests a frequency that is available to five Industrial Radio Services (such as 451.175 MHz[16]). Six coordinators (the public safety coordinator and the five industrial radio coordinators) become involved in the process, resulting in a lengthy period of time for the coordination procedure. Moreover, the applicant may pay multiple coordination fees but receive a recommendation for a frequency that is only secondary to a primary user. The secondary operation remains vulnerable to any subsequent primary authorization and could be terminated even after the expense of multiple coordinations.[17] This scenario points out several problems with the current coordination procedures for Section 90.261 secondary fixed operations in the 450-470 MHz band -- duplication of effort and multiple coordination fees for secondary status. This process can and should be made much simpler.

14. The joint petitioners claim that interference between secondary fixed and primary mobile operations is directly related to our cross-service provisions. They argue that interference would be minimized if fixed use of the mobile frequencies is limited to the service to which the frequencies are allocated. Pointing to an increase in mobile use of Section 90.261 frequencies, the petitioners believe that secondary fixed use will be even more difficult to accommodate and more likely to create interference problems.[18] They have presented no data, however, to support any extensive problems of interference between fixed and mobile operations. In fact, the few interference cases reported informally to the Commission were expeditiously and satisfactorily resolved. Furthermore, fixed operations on these frequencies are authorized on a secondary, non-interference basis only. Thus, the record does not support a need for the rule changes suggested by the joint petitioners to prevent interference.

15. The joint petitioners do, however, raise an important point in suggesting that secondary fixed operations be permitted by eligibles in their own radio services. The original purpose of Section 90.261 was to provide needed spectrum for fixed operations while, at the same time, ensuring that the 450 MHz band would continue to be used primarily for mobile operations.[19] We continue to support this purpose. Under the current provisions of Section 90.261, applicants are limited in the number of frequencies that they can employ for fixed uses. Over the years, however, the 450 MHz band has grown increasingly congested with mobile operations making it more difficult to find spectrum for fixed stations. Furthermore, in recent years, private radio licensees have developed the need to satisfy both their land mobile and fixed requirements with

one radio system. Land mobile systems, providing omnidirectional, point-radius coverage, are ideally suited to serve both types of uses. Increasing the number of frequencies available for secondary fixed operations would provide applicants with additional flexibility in meeting their diverse communications requirements. We therefore propose to allow licensees to use any 450 MHz frequency for secondary fixed operations with a few exceptions that we discuss below.

16. Though fixed use will continue to be on a secondary, non-interference basis to mobile operations, we do not want to rely solely on this condition as the means of controlling and minimizing the interference potential. To this end, we are proposing to maintain the geographical restriction currently reflected in the Rules[20] but to adjust the transmitter power permitted for fixed operations. Maximum transmitter power for fixed operations would be 75 watts, with that limitation reduced to 20 watts if stations are located less than the specified distance from the particular urban areas. The reduction from the current maximum of 350 watts to 75 watts should reduce the potential for interference from secondary to primary operations. We are not proposing to modify the existing transmitter power limitation for primary mobile use.[21]

17. As to the coordination process itself, we conclude that modifications to procedures for coordination of fixed use of 450-470 MHz frequencies are also desirable. We see no need for the exhaustive coordination procedures now required when the applicant receives only secondary status and may be required to terminate operations at any time. The home coordinator's efforts to recommend the most appropriate frequency for secondary fixed use should ensure that the applicant's communication requirements as well as interference concerns are met. In recommending a frequency for fixed use, the home coordinator need not first consider frequencies in its own service but should focus primarily on the most suitable frequency available.

18. We are proposing, therefore, to revise Section 90.261 to indicate that, with certain exceptions as indicated in the proposed revision for Section 90.261 in the Appendix,[22] all private land mobile frequencies in the 450-470 MHz band, including those available to only the Business Radio Service, are available for fixed use on a secondary basis with certain transmitter power limitations. We further propose to amend Section 90.175 to indicate that frequencies for secondary fixed operations in the 450-470 MHz band shall require coordination only from the applicant's certified home coordinator. To assure that coordinators are made aware of secondary fixed usage of frequencies in the band, we will require that a coordinator notify the primary coordinator(s) of any recommendations for secondary fixed use of frequencies in the primary coordinator's radio service. This notification process should result in an accurate data base and address concerns about potential interference from secondary to primary users. This proposal will improve an existing process that has generally worked well since 1968. Finally, our proposal substantially revising Section 90.261 negates the need to incorporate interservice sharing waivers and grandfather provisions for existing systems as suggested by the joint petitioners.[23]

19. The Joint Petition, as a secondary issue, requests that the Section 90.267 offset frequencies be included as part of the provisions of Section 90.261. The Section 90.267 offset frequencies were specifically established to provide additional frequency relief in the 450-470 MHz band for systems that did not require high transmitter powers for their mobile or fixed operations. Allowing Section 90.267 frequencies to be also licensed under the provisions of Section 90.261 would result in double technical standards as the transmitter power requirements are different in each rule section.[24] Authorizations for frequencies would have to specify the rule section under which the grant was made, and the administrative burden on coordinators and the Commission would increase. Because the offset frequencies in Section 90.267 may now be used for fixed operations, we do not see any benefits to this proposal and are not proposing this change as requested in the Joint Petition. We do, however, seek comments on this issue. Additionally, we solicit comment on whether we should also apply the single coordinator approach to the Section 90.267 offset frequencies.

V. CONCLUSION

20. It is in the public interest to establish frequency coordination procedures that will result in minimizing coordination times and expense to applicants. We have considered the arguments presented in the petitions and comments and conclude that our proposals to amend Sections 90.175 and 90.261 of the Rules concerning secondary fixed use of frequencies in the 450-470 MHz band will result in simpler and less costly coordination procedures.[25] We seek comments on the proposals contained herein and on the rule amendments as proposed in the Appendix.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for action

21. The Commission is proposing to change the frequency coordination requirements for the frequencies listed in Section 90.261. This action will permit quicker frequency assignments with less expense to the applicant.

Legal basis

22. Sections 4(i), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended.

Reporting, recordkeeping and other compliance requirements

23. None.

Federal rules which overlap, duplicate or conflict with this rule

24. None.

Description, potential impact, and number of small entities involved

25. This action would be beneficial to small entities in that the cost of frequency coordination could be significantly reduced.

Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives

26. None.

VII. PAPERWORK REDUCTION ACT STATEMENT

27. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and will not increase burden hours imposed upon the public.

VIII. PROCEDURAL MATTERS

28. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

29. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

30. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R § 1.1206.

31. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commissions Rules, 47 C.F.R §§ 1.415 and 1.419, interested parties may file comments on or before **May 24, 1991,** and reply comments on or before **June 10, 1991.** Extensions of time to file comments or replies are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting material. If participants want each Commissioner to receive a personal copy of their comments an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

32. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

It is proposed to amend 47 C.F.R. Part 90 as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R §§ 90.17(c)(10), 90.19(e)(15), 90.21(c)(6), 90.23(c)(7), 90.25(c)(13), 90.53(b)(12), 90.63(d)(14), 90.65(c)(27), 90.67(c)(17), 90.73(d)(18), 90.75(c)(26), 90.79(d)(12), 90.81(d)(3), 90.89(c)(9), 90.91(c)(9), 90.93(c)(3), and 90.95(d)(7) are revised to read as follows:

The requirements for secondary fixed use of frequencies in this band are set forth in § 90.261.

3. 47 C.F.R. § 90.71 is amended by adding the entry 450-470 MHz to the Relay Press Radio Service Frequency Table in § 90.71(b) and adding paragraph (c)(10) to read as follows:

§ 90. 71 Relay Press Radio Service.

* * * * *

(b)* * *

Relay Press Radio Service Frequency Table

Frequency or band	Class of stations(s)	Limitations
* * * * *		
450-470	Fixed	10
* * * * *		

(c)* * *

(10) The requirements for secondary fixed use of frequencies in this band are set forth in § 90.261.

* * * * *

4. 47 C.F.R. § 90.75 is amended by adding the entry 450-470 MHz to the Business Radio Service Frequency Table in paragraph (b) to read as follows, and by removing limitation 26 on the entries for the frequencies 460.650 thru 460.875, 461.025 thru 462.175, 463.200 thru 464.475, 464.525, 464.575 thru 464.975, 465.650 thru 465.875, 466.025 thru 467.175, 468.200 thru 469.475, 469.525, and 469.575 thru 469.975 MHz in the Business Radio Service Frequency Table in §90.75(b).

§ 90.75 Business Radio Service.

* * * * *

(b)* * *

Business Radio Service Frequency Table

Frequency or	Class of Station	band Limitations
* * * * *		
450-470	Fixed	26
* * * * *		

5. 47 C.F.R. § 90.173 is amended by removing the words "or 90.261 of the rules" at the end of the sentence in paragraph (j).

6. 47 C.F.R. § 90.175 is amended by adding a sentence at the end of the introductory paragraph to read as follows:

§ 90.175 Frequency coordination requirements.

* * * Frequencies in the 450-470 MHz band, when used for secondary fixed operations as described in § 90.261, require coordination only by the certified coordinator of the radio service in which the applicant is eligible.

* * * * *

7. 47 C.F.R. § 90.261 is revised to read as follows:

§ 90.261 Assignment and use of the frequencies in the band 450 - 470 MHz for fixed operations.

(a) Except for the frequencies listed in paragraph (b) of this section, frequencies in the 450-470 MHz band as listed in the tables of frequencies for the radio services in this part may be assigned to eligibles for fixed use on a secondary basis to land mobile operations. Stations located 140 km (87 mi) or more from the center of any urbanized area of 600,000 or more population are limited to a transmitter output power of 75 watts. Stations less than 140 km (87 mi) from the centers of these areas are limited to a transmitter output power of 20 watts. Urbanized areas of 600,000 or more population are defined in the U.S. Census of Population 1970, Vol. 1, Table 20, pages 1-74. The centers of the urbanized areas are determined from the Appendix, page 226, of the U.S. Department of Commerce publication, "Airline Distance Between Cities in the United States." All fixed systems are limited to one frequency pair with 5 MHz spacing and must employ directional antennas with a front-to-back ratio of 15 dB, except that omnidirectional antennas having unity gain may be employed for stations communicating with a minimum of three receiving locations encompassed in a sector of at least 160° in azimuth. Stations authorized fixed operation prior to (effective date of the rules), may continue to operate under the conditions of their initial authorization.

(b) Secondary fixed operations pursuant to paragraph (a) of this section will not be authorized on the following frequencies:

Frequencies (MHz)

451.800/465.800

452.525
452.550
452.575
452.600

452.925/457.925
452.950/457.959

453.025/458.025
453.075/458.075
453.125/458.125
453.175/458.175

454.000/459.000

460.650/465.650
460.675/465.675
460.700/465.700
460.725/465.725
460.750/465.750
460.775/467.775
460.800/465.800
460.825/465.825

460.850/465.850
460.875/465.875
460.900/465.900
460.925/465.925
460.950/465.950
460.975/465.975
461.000/466.000

462.750
462.775
462.800
462.825
462.850
462.875
462.900
462.925
462.950/467.950
462.975/467.975
463.000/468.000
463.025/468.025
463.050/468.050
463.075/468.075
463.100/468.100
463.125/468.125
463.150/468.150
463.175/468.175

464.500/469.500
464.550/469.550

FOOTNOTES

[1] Petition for Rule Making, RM-6146, filed October 13, 1987, Public Notice, November 9, 1987 (Report No. 1689). Comments on the Petition were filed by Brown and Schwaninger, the Association of American Railroads (AAR), the Associated Public-Safety Communications Officers, and the American Petroleum Institute (API). Reply Comments were filed by SIRSA.

[2] Joint Petition for Rule Making, RM-6361, filed March 21, 1988, Public Notice, May 12, 1988 (Report No. 1728). Comments on the Joint Petition were filed by the National Association of Business and Educational Radio, Inc. (NABER), API, and SIRSA. Reply Comments were filed by the Petitioners.

[3] The one exception to this is the Business Radio Service. Fixed use of Business Radio Service frequencies is governed by Sections 90.261(d) and 90.75(c)(26). They are not available for fixed use on an interservice basis under Section 90.261.

[4] SIRSA Petition at 5.

[5] Currently, Section 90.175 requires a showing of frequency coordination for the Section 90.261 frequencies and states that when frequencies are shared by more than one service, concurrence must be obtained from the other applicable certified coordinators. Section 90.261 does not make reference to any coordination requirements. Frequencies listed in Section 90.261 are, however, considered shared by more than one service and therefore are covered by that provision of Section 90.175.

[6] Brown and Schwaninger Comments at 2.

[7] *Id.* at 7.

[8] AAR Comments at 4.

[9] This recommendation by APCO is repeated as a proposal in the Joint Petition. *See* paras. 10-11, *infra*.

[10] Joint Petition at 2 and 3.

[11] *Id.* at 4.

[12] The offset frequencies listed in Section 90.267 are those frequencies 12.5 kHz removed from normally assigned frequencies in the 450-470 MHz band. These frequencies are intended to satisfy the needs of users with small operational area requirements. Consequently, except for stations operating on offset frequencies available exclusively in the Special Industrial Radio Service, these frequencies are limited to two watts output power and are authorized on a secondary, non-interference basis to the adjacent full-power frequencies.

[13] API Comments at ii and iii.

[14] SIRSA Comments at ii, 5, 8, and 11.

[15] NABER Comments at 3. Fixed use of Business Radio Service frequencies are governed by Sections 90.261(d) and 90.75(c)(26). They are not available for fixed use on an interservice basis under the provisions of Section 90.261.

[16] The combined frequency list in § 90.555(b) indicates that 451.175 MHz is shared by the Power, Petroleum, Forest Products, Telephone Maintenance, and Manufacturers Radio Services.

[17] This differs from the interservice sharing coordination process for primary frequencies where an applicant could also pay multiple coordinator fees, but would receive a recommendation for primary use of a frequency. *See* 47 C.F.R. § 90.176.

[18] Joint Petition at 8.

[19] *See* Further Notice of Proposed Rule Making, Docket No. 13847, 10 FCC 2d 885 (1967), and Second Report and Order, Docket No. 13847, 11 FCC 2d 648 (1968).

[20] Section 90.261 limits fixed use of the frequencies to locations 85 miles or more from the centers of certain urban areas, or 65 miles if the transmitter output power does not exceed 20 watts.

[21] Section 90.205(b) permits a maximum of 350 watts transmitter power for frequencies in the 450-470 MHz band when used for primary land mobile operations in all radio services except land transportation radio services which are limited to 75 watts.

[22] The frequencies listed in the proposed Section 90.261 in the Appendix are reserved for specific mobile radio uses and are currently not permitted to be used for fixed operations. Typical uses of these frequencies are for medical emergency, medical mobile telemetry and paging, airport service support, and exclusive central station alarm systems. We are proposing to retain the restriction on fixed use of these frequencies but request comments on such continuance.

[23] We are, however, proposing to allow existing secondary fixed operations to continue using the transmitter power specified in their initial authorization.

[24] Except for certain Special Industrial Radio Service frequencies, Section 90.267 frequencies are limited to two watts power output. Systems using the same frequencies, when authorized under Section 90.261, may be authorized power levels ranging from 20-350 watts depending upon the system location and the radio service involved.

[25] As previously indicated in paragraph 6, Brown and Schwaninger suggested that the SIRSA Petition be granted directly without a notice and comment proceeding. The Commission is required to issue a Notice of Proposed Rule Making pursuant to Section 1.412 of the Rules, 47 C.F.R. § 1.412,

because the proposed rule changes contained herein do not fall within the scope of Section 1.412(b) and (c), 47 C.F.R. § 1.412(b) and (c).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 1, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH'S PETITION FOR WAIVER OF COMPUTER II

On March 7, 1991, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth) filed a petition for waiver of the Computer II rules to offer an Account Code Billing service (ACB) to their intraLATA toll customers. According to BellSouth, ACB is an enhanced service feature that allows business customers to "tag" each outgoing intrastate and interstate intraLATA toll call with a multi-digit account number selected by the customer, and to have the customers' monthly telephone bill sorted, displayed, and subtotaled by account code number.

BellSouth states that ACB would be offered on an integrated basis through its operating telephone companies, and would be provided through BellSouth's Traffic Operator Position System (TOPS) switches. BellSouth states that all costs associated with ACB will be assigned and removed from the companies' regulated accounts in accordance with its approved Cost Allocation Manual (CAM), and that BellSouth will file any necessary revisions to its CAM prior to offering ACB.

BellSouth states that the waiver is in the public interest because compliance with Computer II or Comparably Efficient Interconnection (CEI) requirements would unnecessarily increase service costs, making the provision of ACB economically infeasible. BellSouth adds that ACB is similar to Customer Dialed Account Recording (CDAR) and to AT&T's Subaccount Billing (SAB) service. BellSouth states that the Commission granted BellSouth and other BOCs a waiver of the Computer II rules for CDAR, and AT&T a waiver of the CEI requirements for SAB.

Interested parties should file comments on the petition by **April 22, 1991**, and reply comments by **May 2, 1991**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petitions can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (KFRC) San Francisco, California	**MM DOCKET NO. 84-1098** File No. BR-43
For Renewal of License	
GOLD COAST BROADCASTING, INC. San Francisco, California	**MM DOCKET NO. 84-1099** File No. BP-800930AL
PAUL J. GROWALD San Francisco, California	**MM DOCKET NO. 84-1100** File No. BP-830509AE
SOUTH JERSEY RADIO, INC. Richmond, California	**MM DOCKET NO. 84-1101** File No. BP-830511AG
GOLD MOUNTAIN BROADCASTING CO. San Francisco, California	**MM DOCKET NO. 84-1110** File No. BP-830512BX
COZZIN COMMUNICATIONS Richmond, California	**MM DOCKET NO. 84-1111** File No. BP-830512BQ
For Construction Permit for a New AM Station	
SOUTH JERSEY RADIO, INC. Assignor	
and	File No. BAL-901130EC
BEDFORD BROADCASTING COMPANY Assignee	
For Consent to Assignment of License for KFRC	
and Related Application	File No. BL-900730AE

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1991; Released: March 20, 1991

By the Commission:

1. Before the Commission is a proposed settlement of the comparative renewal proceeding involving station KFRC, licensed to RKO General, Inc.[1] This settlement is intended not only to resolve the San Francisco proceeding but to terminate a series of interrelated proceedings originally involving 14 RKO-owned stations. The main features of the proposed settlement are: (1) RKO's renewal application for station KFRC would be dismissed; (2) the mutually exclusive applications of Gold Coast Broadcasting, Inc., Paul J. Growald, and Gold Mountain Broadcasting Co. would be dismissed;[2] (3) South Jersey Radio, Inc.'s mutually exclusive application for KFRC would be granted; (4) South Jersey would assign the license for KFRC to Bedford Broadcasting Company; [3] (5) Bedford would acquire the physical and other assets of KFRC. Under the agreement Bedford would make payments of $8,000,000, of which RKO would retain $4,193,000 and the other applicants and their principals would receive $3,807,000.[4] For the reasons outlined below, we approve the settlement and grant the related applications.

2. The parties contend that their settlement would serve the public interest by avoiding further burdensome litigation in this case and by helping to resolve the protracted and complex set of interrelated proceedings originally involving 14 RKO-owned stations, including KFRC. RKO's basic and comparative qualifications have been at issue in this series of proceedings for more than 25 years.[5] The parties also contend that approval of the agreement will put KFRC into the hands of an unarguably qualified licensee that would not suffer the same uncertainties as to its future as RKO does. The parties have submitted affidavits stating that they filed their applications in good faith and not for the purpose of reaching or carrying out a settlement agreement. The Bureau supports approval of the settlement.

3. We have fully considered and approved a settlement agreement similar to the instant one in the KHJ-TV, Los Angeles, California proceeding (Docket Nos. 16679-80). *RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd 5057 (1988).[6] We there concluded that strong public interest considerations favor settling what has become one of the most protracted and burdensome proceedings in the Commission's history. Although the circumstances in this case are not identical to those in the Los Angeles proceeding, we believe that essentially the same public interest considerations govern both proceedings. That is, we continue to believe that the public interest is better served in this case by ending this uniquely protracted litigation -- which threatens to continue for many years to come -- so that RKO can withdraw as a licensee and an unquestionably qualified licensee, able to devote its full resources to broadcasting, can take over the ownership of the stations and operate them without a cloud of uncertainty hanging over its head. Approval of the settlement before us disposes of the last remaining RKO-owned broadcast station. It thereby consummates the public interest goals envisioned by the Commission, in authorizing settlements in the KHJ-TV proceeding, by resolving the RKO-related

litigation in its entirety and facilitating service to the public by licensees whose qualifications are unquestioned.[7]

4. We also note that approving the settlement would preserve our policy of deterring licensee misconduct. RKO would not receive full compensation for the license. Under the terms of the settlement agreement, RKO would receive only 52 percent of the proceeds of the sale.[8] Further, RKO has already suffered the loss of WNAC-TV in Boston, which was subsequently valued at more than $400 million. And it has received substantially less than full value for 12 stations sold pursuant to other settlements. In addition, approval of this settlement results in the complete withdrawal of RKO from broadcasting. In more than 20 years of burdensome litigation, RKO has seen its original, extensive broadcast holdings dismantled at great cost. The outcome of these proceedings amply demonstrates that broadcasters cannot expect to avoid scrutiny of significant allegations bearing on their qualifications to remain licensees. Consistent with our disposition of the KHJ-TV agreement, therefore, and for the reasons stated more fully there and which we incorporate herein by reference, we hold that approving the agreement before us would serve the public interest. Similarly, we find that the agreement complies with 47 U.S.C. § 311(d) and 47 C.F.R. § 73.3525. We note, moreover, that in a pleading filed February 12, 1991, the Bureau states that it has reviewed the assignment application and finds that the proposed assignee is qualified.

5. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Approval of Settlement Agreement and Related Relief filed July 27, 1990 as modified and superseded by the Amendment to Joint Petition for Approval of Settlement Agreement and Related Relief filed November 29, 1990 IS GRANTED and the relevant associated Agreements ARE APPROVED.[9]

6. IT IS FURTHER ORDERED, That the following applications for renewal of license and for construction permits ARE DISMISSED with prejudice: RKO General, Inc. (File No. BR-43), Gold Coast Broadcasting, Inc. (File No. BP-800930AL), Paul J. Growald (File No. BP-830509AE), and Gold Mountain Broadcasting Co. (File No. BP-830512BX); and that the applications of South Jersey Radio, Inc. (File Nos. BP-830511AG, BL-900730AE) for construction permit and for license to cover the construction permit ARE GRANTED; and that the application for assignment of KFRC to Bedford Broadcasting Company (File No. BAL-901130EC) IS GRANTED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED; the partial initial decision, Review Board Decision, and Commission memorandum opinion and order dealing with the qualifications of the various applicants for a construction permit (*RKO General, Inc. (KFRC)*, FCC 86D-49 (Aug. 8, 1986), *reversed in part*, 4 FCC Rcd 4997 (Rev. Bd. 1990), *remanded*, 5 FCC Rcd 3222 (1990) ARE VACATED as moot,[10] and the Review Board IS DIRECTED to terminate the proceedings before it relating to the comparative qualifications of the various applicants.[11]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: (1) a Joint Petition for Approval of Settlement Agreement and Related Relief filed July 27, 1990 by RKO General, Inc., Gold Coast Broadcasting, Inc., Paul J. Growald, South Jersey Radio, Inc., Gold Mountain Broadcasting Co., and COZZIN Communications Corporation; (2) an Amendment to Joint Petition for Approval of Settlement Agreement and Related Relief filed November 29, 1990 by the aforementioned parties and by Bedford Broadcasting Company; and (3) Comments filed August 6, 1990, January 24, 1991, and February 12, 1991 by the Mass Media Bureau.

[2] Additionally, COZZIN Communications Corporation would dismiss its appeal of *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990), which upheld the denial of COZZIN'S application.

[3] In the original joint petition, the proposed assignee of KFRC was The Daytona Group of California, Inc. The parties report that intervening circumstances resulted in the termination of the asset purchase agreement between RKO and Daytona and the negotiation of a new agreement with Bedford in lieu of Daytona. The November 29 amendment, in addition to substituting Bedford for Daytona, modified the terms of the settlement in certain minor respects.

[4] The payments to the other applicants would be distributed as follows:

Gold Coast	$ 201,818
Growald	$1,256,728
COZZIN	$ 583,363
South Jersey (and a principal)	$1,181,728
Gold Mountain	$ 583,363

[5] A detailed history of these proceedings is set forth in *RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd 5057 (1988).

[6] We have also approved nine settlements involving 12 other RKO stations. *See RKO General, Inc. (WHBQ)*, 3 FCC Rcd 5055 (1988); *RKO General, Inc. (WGMS)*, 3 FCC Rcd 5262 (1988); *RKO General, Inc. (WRKO)*, 3 FCC Rcd 6603 (1988), *RKO General, Inc. (WOR)*, 4 FCC Rcd 4072 (1989); *RKO General, Inc. (WFYR-FM)*, 4 FCC Rcd 4083 (1989); *RKO General, Inc. (KRTH)*, 4 FCC Rcd 4089 (1989); *RKO General, Inc. (WOR)*, 4 FCC Rcd 5747 (1989); *RKO General, Inc. (WHBQ-TV)*, 5 FCC Rcd 638 (1990); *RKO General, Inc. (WAXY-FM)*, 5 FCC Rcd 642 (1990).

[7] For this reason, we today adopt a companion order terminating Phase I of the KHJ-TV proceeding, in which RKO's qualifications to be the licensee of any station are under consideration. *RKO General, Inc. (KHJ-TV)*, FCC 91-83 (adopted Mar. 15, 1991).

[8] As in *KHJ-TV*, it is significant to our approval of the agreement that RKO is receiving significantly less than 75 percent of the fair market value of the station.

[9] As they have requested, the parties may consummate the mutually contingent transactions in a single closing. Our action shall be effective with respect to the termination of the parties' hearing rights upon their notifying us of closing under those transactions.

[10] The parties request this relief, and it is customary practice. *See United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950); *Boston Community Media Committee, Minority Caucus v. FCC*, 509 F.2d 516, 517 (D.C. Cir. 1975).

[11] Accordingly, the Joint Motion for Stay of Proceedings Pending Before the Review Board filed July 27, 1990 by RKO, Gold Coast, Growald, South Jersey, Gold Mountain, and COZZIN IS DISMISSED as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN MOBILE SATELLITE CORPORATION File No. 13-DSS-AL-91(3)

Application for *pro forma* assignment of license

ORDER AND AUTHORIZATION

Adopted: March 22, 1991; Released: March 22, 1991

By the Chief, Domestic Facilities Division:

1. American Mobile Satellite Corporation (AMSC) has filed an application for the pro forma assignment of its authorizations to construct, launch and operate a mobile satellite system[1] from AMSC to AMSC Subsidiary Corporation (Subsidiary). For the reasons discussed below, the applications are granted.

2. AMSC states that AMSC Subsidiary is to be a newly-formed, wholly-owned subsidiary of AMSC. AMSC is to hold 100% of the stock of AMSC Subsidiary. In addition, AMSC Subsidiary's officers are to be identical to the officers of AMSC and each of AMSC Subsidiary's directors also serves as a director of AMSC. AMSC submits that grant of this application will facilitate the construction, launch and operation of the authorized facilities.

3. Because ultimate control of the satellite system will remain with AMSC, Commission approval may be granted on a *pro forma* basis and does not require a thirty-day notice period as specified in Sections 309(b) and (d)(1) of the Communications Act, 47 U.S.C. 309(b) and (d)(1). AMSC's qualifications to construct, launch and operate a mobile satellite system are a matter of record before the Commission. Consequently, AMSC Subsidiary is similarly found to be legally, technically, financially and otherwise qualified to be a licensee in the Mobile Satellite Service.

4. We note that the United States Court of Appeals has issued a decision in this proceeding that requires us to reconsider our licensing decisions. *Aeronautical Radio Inc. v. FCC*, No. 88-1009, slip op. (D.C. Cir. March 19, 1991). However, we see no possibility that our action here will prejudge the outcome of that proceeding or would be inconsistent with our obligations on remand.

5. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. 0.291, American Mobile Satellite Corporation's application for consent to assignment of its authorizations for a mobile satellite system IS GRANTED. All existing terms and conditions applicable to these authorizations shall remain in full force and effect.

6. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

FOOTNOTE

[1] American Mobile Satellite Corporation, 4 FCC Rcd 6041 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

LETTER
March 21, 1991

Donna R. Searcy
Secretary

Released: March 27, 1991

Duffy II Corporation
5220 North 7th Street
Phoenix, Arizona 85014

Arizona Television Company
3435 North 16th Street
Phoenix, Arizona 85016

Dear Applicants:

This letter is in reference to your application (BALH-900402HP) seeking the Commission's consent to the assignment of license of station KESZ(FM), Phoenix, Arizona, from Duffy II Corporation ("Duffy") to Arizona Television Company ("ATC").

ATC is the licensee of station KTVK(TV) (Channel 3, ABC), Phoenix, Arizona. The 1 mV/m contour of station KESZ(FM), and the Grade A contour of station KTVK(TV) encompass the city of Phoenix. Section 73.3555(b)(2) of the Commission's Rules generally provides that television/radio combinations cannot be created where the 1 mV/m contour of an FM station encompasses the entire community of license of the television station; or where the Grade A contour of a television station encompasses the entire community of license of the radio station. Accordingly, ATC has requested a waiver of the rule. In support of its request, ATC correctly notes that Arbitron ranks Phoenix, Arizona, as the 20th largest market. Also, ATC submits that, in addition to stations KTVK(TV) and KESZ(FM), there will be at least 35 separately owned and operated broadcast voices in that market, once the proposed assignment is consummated. The waiver request is unopposed.

In *Amendment of Section 73.3555*, 4 F.C.C. Rcd. 1741, *reconsidered in part*, 4 F.C.C. Rcd. 6489 (1989), we set out standards for reviewing requests for waivers of the rule. We concluded that we would look favorably on waiver requests in the top 25 markets, where 30 or more voices would remain after the proposed combination. 4 F.C.C. Rcd. at 1751. Because Phoenix is the 20th largest market, and because, as appropriately demonstrated by ATC, there will be more than 30 separate voices in that market after the proposed assignment, ATC meets this standard. Accordingly, its request for waiver of Section 73.3555(b)(2) is granted.

We further find that the applicants are fully qualified and that a grant of the application will serve the public interest, convenience and necessity. Accordingly, the application (BALH-900402HP) is granted.

This item was adopted by the Commission on March 21, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 395
BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4	Transmittal No. 354
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68	Transmittal No. 2039
US West Communications Revisions to Tariff F.C.C. No. 1	Transmittal No. 127

MODIFICATION OF MEMORANDUM OPINION AND ORDER

Adopted: March 21, 1991; Released: March 21, 1991

By the Chief, Common Carrier Bureau:

1. On November 1, 1990, the Bell Atlantic Telephone Companies, the BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications filed general, averaged rates for dark fiber service. On February 22, 1991, the Common Carrier Bureau suspended a portion of the carriers' respective dark fiber charges, instituted an investigation into their rates, and allowed the remaining portion of the charges to take effect.[1]

2. Section 1.113(a) of the Commission's Rules, 47 C.F.R. § 1.113(a), provides in pertinent part that "[w]ithin 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel, or board taking the action may modify or set it aside on its own motion."

3. Accordingly, the Common Carrier Bureau, on its own motion, hereby modifies the *Dark Fiber Tariff Order* to add a new paragraph immediately following paragraph 22. The additional paragraph reads as follows:

> 22a. The per mile per strand rates listed above constitute the base rate which the carriers should use to calculate any volume discounts in the rates as they were originally filed. *See, e.g.*, Southwestern Bell Telephone Company's rate matrices for dark fiber service, Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 2039, 5th Revised Page 280.1. We note that we do not intend by our Order to change any rate structure proposed by the carriers. Therefore, the carriers are free to continue the volume discount structures reflected in their tariffs, if they desire. However, the rate levels for any proposed volume discounts should be calculated using the base rates listed above.

4. Accordingly, IT IS ORDERED that Bell Atlantic Telephone Companies *et al.*, CC Docket No. 88-136, Memorandum Opinion and Order, DA 91-228, rel. Feb. 22, 1991 (Com.Car.Bur.) IS AMENDED to reflect the addition of paragraph 22a.

5. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications, Inc., SHALL FILE a supplement reflecting their volume discount structure no later than five business days from the release date of this Order.

6. IT IS FURTHER ORDERED that Special Permission No. 91-226 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purpose of complying with this Order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] The tariffs took effect on February 22, 1991. *See* Bell Atlantic Telephone Companies *et al.*, CC Docket No. 88-136, Memorandum Opinion and Order, DA 91-228, released Feb. 22, 1991 (Com.Car.Bur.) (*Dark Fiber Tariff Order*), *pet'n for stay & app. for review pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-236

In re Applications of

SUSAN S. MULKEY	File No. BPCT-850320KF
KOONTZ COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPCT-850320KH
FAMILY 55 TV, INC.	File No. BPCT-850320KI
CATAWBA COMMUNICATIONS, INC.	File No. BPCT-850320KJ
NEISLER LIMITED PARTNERSHIP	File No. BPCT-850320LE
METROLINA MEDIA, INC.	File No. BPCT-850320LF

For Construction Permit for a New Television Station at Rock Hill, South Carolina

ORDER

Adopted: February 15, 1991; Released: February 19, 1991

1. In a Decision, *Susan S. Mulkey*, 3 FCC Rcd 590 (1988), the Review Board granted the application filed by Koontz Communications Limited Partnership. Now before the Commission are Applications for Review filed March 10, 1988 by Susan S. Mulkey, Family 55 TV, Inc., Catawba Communications, Inc., Neisler Limited Partnership, and Metrolina Media, Inc.; a Motion to File Supplement and Supplement to Application for Review, both filed April 25, 1988 by Neisler; and related pleadings. In a Memorandum Opinion and Order, *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989), the Commission authorized Family 55 to file further financial information. On August 31, 1989 Family 55 filed a Further Submission of Financial Information.[1] At the request of the parties, further consideration of this proceeding has been deferred to permit the parties to negotiate a settlement agreement. Koontz, on behalf of all six remaining applicants, filed a Joint Request for Approval of Settlement Agreements and Petition for Leave to Amend on January 31, 1991, and a Supplement providing original certification pages and a site map for the proposed amendment, on February 13, 1991. On February 13, 1991, the Mass Media Bureau filed comments in support of the settlement agreement. In addition, on January 29, 1991 Family 55 filed a Petition for Leave to Amend and an Amendement.[2]

2. The settlement agreement provides for the merger of Koontz, Family 55, and Neisler into a new corporation, Rock Hill Broadcasting Corporation (RHBC). Koontz will own 38.472 per cent of the stock in RHBC; Family 55 will own 38.472 per cent; and Neisler will own 23.056 per cent. Koontz seeks to amend its application to specify RHBC as the new applicant. Under the settlement agreement, the parties request the grant of Koontz's application, as amended, and the dismissal of the remaining applications. Family 55 and Neisler will receive their interests in RHBC in consideration of their agreement to dismiss their own applications. As compensation for the dismissal of the other applications, RHBC will issue promissory notes to Mulkey for $10,000, Catawba $10,000 and Metrolina $20,000. The notes will be due and payable within 60 days from the date that RHBC "draws down on any construction financing" or in the event that RHBC assigns the construction permit, at the time of the closing of the assignment transaction. The parties also ask the Commission to vacate the ALJ's decision, *Moore Broadcast Industries*, 2 FCC Rcd 2754 (ALJ 1987), the decision of the Review Board, *Susan S. Mulkey*, 3 FCC Rcd 590 (Rev. Bd. 1988); and the Commission's Memorandum Opinion and Order, *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989).

3. The Joint Request complies with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525 which govern settlement agreements. The parties have submitted a copy of the settlement agreement and declarations under penalty of perjury certifying that there is no undisclosed consideration and that their applications were not filed for the purpose of negotiating a settlement. Moreover, good cause has been shown for the amendment of Koontz's application to specify RHBC as the applicant. Finally, it appears that the settlement will serve the public interest by terminating the proceeding and expediting the institution of a new television service in Rock Hill, South Carolina.

4. ACCORDINGLY, IT IS ORDERED, That pursuant to the delegation of authority in 47 C.F.R. § 0.251(f), the Joint Request for Approval of Settlement Agreements and Petition for Leave to Amend filed January 31, 1991 and Supplemented on February 13, 1991 by Koontz Communications Limited Partnership, Susan S. Mulkey, Family 55 TV, Inc., Catawba Communications, Inc., Neisler Limited Partnership and Metrolina Media, Inc., IS GRANTED, the attached settlement agreement IS APPROVED and the amendment IS ACCEPTED; and that the Petition for Leave to Amend filed January 29, 1991 by Family 55 TV, Inc. IS GRANTED and the attached amendment IS ACCEPTED.

5. IT IS FURTHER ORDERED, That the application (File No. BPCT-850320KH) filed by Koontz Communications Limited Partnership, as amended to specify Rock Hill Broadcasting Corporation as the applicant, IS GRANTED; and that the applications filed by Susan S. Mulkey (File No. BPCT-850320KF), Family 55 TV, Inc. (File No. BPCT-850320KI), Catawba Communications, Inc. (File No. BPCT- 850320KJ), Neisler Limited Partnership (File No. BPCT-850320LE), and Metrolina Media, Inc. (File No. BPCT-850320LF) ARE DISMISSED.

6. IT IS FURTHER ORDERED, That the Applications for Review filed March 10, 1988 by Susan S. Mulkey, Family 55 TV, Inc., Catawba Communications, Inc., Neisler Limited Partnership, and Metrolina Media, and the Motion to File Supplement and Supplement to Application for Review, both filed April 25, 1988 by Neisler Limited Partnership ARE DISMISSED; and that the Initial Decision, *Moore Broadcast Industries*, 2 FCC Rcd 2754 (ALJ 1987), the Review Board Decision, *Susan S. Mulkey*, 3 FCC Rcd 590 (Rev. Bd. 1988), and the Memorandum Opinion and Order, *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989) ARE VACATED as moot; [3] and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Robert L. Pettit
General Counsel

By John I. Riffer
Associate General Counsel

FOOTNOTES

[1] According to the Bureau, Family 55's Further Submission establishes that it was financially qualified when it filed its application and that there are no unresolved questions concerning its financial qualifications. *See* Comments filed February 13, 1991 at ¶¶ 5-6.

[2] Family 55 is a corporation with voting and non-voting stock. It petitions to amend its application to transfer 49.5% of its voting stock and all of its non-voting stock to Rev. Gene Hood. Diane Wells who formerly owned all of the voting stock will still control the applicant and none of Family 55's principals will be integrated into the proposed operation of the new station. Good cause having been shown, the petition for leave amend filed by Family 55 will be granted.

[3] This is the customary practice where matters become moot before the completion of review. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1975); *Boston Community Media Committee Minority Caucus v. FCC*, 509 F.2d 516, 517 (D.C. Cir. 1975); and *RKO General, Inc. (WRKO)*, 3 FCC Rcd 6603, 6604¶ 8, n.6 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

DOCKET NO. 16679

In re Application of

RKO GENERAL,
INC. (KHJ-TV)
Los Angeles, File No. BRCT-58
California

For Renewal of Broadcast
License

ORDER

Adopted: March 15, 1991; Released: March 20, 1991

By the Commission:

1. This proceeding was designated to determine the basic qualifications of RKO General, Inc. to be the licensee of KHJ-TV, Los Angeles, California and 13 co-owned stations. These were: WGMS/WGMS-FM, Bethesda, Maryland/Washington, D.C.; WRKO/WROR-FM, Boston, Massachusetts; WFYR-FM, Chicago, Illinois; WAXY-FM, Fort Lauderdale, Florida; WHBQ-TV/WHBQ, Memphis, Tennessee; KHJ/KRTH-FM, Los Angeles, California; WOR/WRKS-FM, New York, New York; and KFRC, San Francisco, California.

2. On August 11, 1987, Administrative Law Judge Edward J. Kuhlmann issued a partial supplemental initial decision in this proceeding. *RKO General, Inc. (KHJ - TV)*, 2 FCC Rcd 4807 (I.D. 1987). Judge Kuhlmann concluded that RKO lacks the requisite qualifications to be a licensee.

3. Now before the Commission are exceptions to the partial initial decision filed October 19, 1987 by RKO, and contingent exceptions filed October 20, 1987 by Fidelity Television, Inc., and Adwave Company et al. RKO, Fidelity, and Adwave filed replies on December 11, 1987, and Future Broadcasting, Inc. filed a reply on December 14. The Commission heard oral argument on April 28, 1988.

4. While these matters were under advisement, the Commission considered and approved settlement agreements relating to the 14 stations originally at issue. As a result of these settlements, we terminated the hearing proceedings involving each of RKO's stations. *RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd 5057 (1988); *RKO General, Inc. (WHBQ)*, 3 FCC Rcd 5055 (1988); *RKO General, Inc. (WGMS)*, 3 FCC Rcd 5262 (1988); *RKO General, Inc. (WRKO)*, 3 FCC Rcd 6603 (1988), *RKO General, Inc. (WOR)*, 4 FCC Rcd 4072 (1989); *RKO General, Inc. (WFYR - FM)*, 4 FCC Rcd 4083 (1989); *RKO General, Inc. (KRTH)*, 4 FCC Rcd 4087 (1989); *RKO General, Inc.* (WOR), 4 FCC Rcd 5747 (1989); *RKO General, Inc. (WHBQ-TV)*, 5 FCC Rcd 638 (1990); *RKO General, Inc. (WAXY-FM)*, 5 FCC Rcd 642 (1990); *RKO General, Inc. (KFRC)*, FCC 91-82 (adopted Mar. 15, 1991). In each instance, we concluded that because of the strong public interest from bringing service to the affected communities by an unquestionably qualified licensee and because the settlements would not undermine our policy of deterring licensee misconduct, the settlements would serve the public interest irrespective of the outcome of Phase I. As part of the settlements, RKO received reimbursement of significantly less than 75 percent of the fair market value for each of the stations. Consequently, RKO's qualifications to hold those stations are no longer at issue and this proceeding has become moot.[1]

5. ACCORDINGLY, IT IS ORDERED, That the exceptions to the partial initial decision, filed October 19, 1987 by RKO General, Inc., and the contingent exceptions filed October 20, 1987 by Fidelity Television, Inc. and Adwave Company et al. and responsive pleadings ARE DISMISSED as moot.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED; the Motion of RKO General, Inc. to Vacate Partial Supplemental Initial Decision and Terminate Proceeding filed February 14, 1991 IS GRANTED; and the partial supplemental initial decision dealing with RKO's basic qualifications, *RKO General, Inc. (KHJ-TV)*, 2 FCC Rcd 4807 (I.D. 1987) IS VACATED as moot.[2]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Before the Commission is a Motion of RKO General, Inc. to Vacate Partial Supplemental Initial Decision and Terminate Proceeding filed February 14, 1991, which addresses this circumstance, and comments filed February 26, 1991 by the Mass Media Bureau and February 27, 1991 by Gold Coast Broadcasting, Inc.

[2] RKO requests this relief, and it is customary practice. *See United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950); *Boston Community Media Committee, Minority Caucus v. FCC*, 509 F.2d 516, 517 (D.C. Cir. 1975). In accordance with our practice with respect to the RKO settlement agreements, our action shall be effective upon the parties notifying us of closing under the KFRC, San Francisco, settlement.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY

Petition for Emergency
Investigation and Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: March 21, 1991; Released: March 22, 1991

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* we address a petition filed by NCR Corporation (NCR) on February 13, 1991 seeking a Commission investigation into American Telephone and Telegraph Company's (AT&T) proposed acquisition of the stock of NCR. NCR proposes that the Commission thereafter, to the extent necessary, bar AT&T from relying on the credit and earning power of its regulated operations to finance the proposed acquisition. For the reasons set forth below, we deny NCR's petition.

II. BACKGROUND

2. On December 6, 1990 AT&T commenced a tender offer for all of the outstanding NCR stock at $90 cash per share, at a total estimated cost of $6.1 billion. AT&T did not disclose how it plans to permanently finance the purchase. Following a vote by the NCR Board of Directors on December 14 recommending that NCR shareholders reject AT&T's offer, AT&T solicited NCR's stockholders for a special meeting to replace the NCR Board of Directors with directors who would not oppose the acquisition.[1] The special meeting is scheduled for March 28, 1991.

3. In its petition, NCR asserts that the Commission must " . . . put itself as quickly as possible in possession of the full facts concerning the condition of AT&T's nonregulated operations, the manner in which it proposes to finance the acquisition of NCR and the likely effects of that acquisition upon AT&T's regulated operations."[2] NCR concludes that such an inquiry will show a "substantial danger" that after the purchase, AT&T will be unable to maintain an adequate level of investment in its regulated operations. Accordingly, NCR urges the Commission to enter an order barring AT&T from relying on the credit and earning power of its regulated operations in support of the tender offer. [3]

4. In support of its request, NCR states that mergers and acquisitions in the computer business are "fraught with peril," and that it believes that AT&T's current computer operations already are incurring heavy losses. Citing *Comsat, Inc.*, 42 FCC 2d 677 (1973), and the Commission's *Computer II* capitalization plan requirements, NCR asserts that the Commission has previously inquired into the manner in which carriers propose to finance their nonregulated operations to ensure that those activities do not impair their ability to maintain the level of investment necessary to provide regulated services. NCR acknowledges that the Commission has lifted the *Computer II* capitalization plan requirement for AT&T, but it urges us to conduct a review of AT&T's proposed financing in this case because the size of this acquisition raises a risk that consummation of the tender offer would cause a "massive hemorrhaging of capital" from AT&T's regulated operations.[4] As evidence to support its argument that the proposed acquisition threatens AT&T's ability to invest in regulated operations, NCR submits a study conducted by Price Waterhouse concluding that, based on 1989 financial data, AT&T would experience a post-merger negative cash flow (even before the payment of dividends). NCR also cites the size of the acquisition in comparison to AT&T's shareholder equity and the market value of its equity, asserting that the proposed merger has far greater financial implications than the *Computer II* capitalization plans that the Commission reviewed. NCR also provides a study purporting to show that the market price of AT&T's stock declined net of changes in the market after rumors of the merger were published, and notes that rating agencies have placed AT&T bonds on their "watch lists" for possible downgrading.[5]

5. AT&T filed an opposition to NCR's petition on February 25, 1991 and NCR replied on March 7. These pleadings will be discussed to the extent necessary in Section III, *infra*.

III. DISCUSSION

6. NCR's petition raises two issues: (1) Should the Commission conduct further inquiry into AT&T's proposed acquisition to fulfill its regulatory responsibilities; and (2) what additional safeguards, if any, are required to ensure that ratepayers do not bear any adverse consequences if the AT&T/NCR merged computer operation is unsuccessful? Another issue that may be presented by the proposed acquisition is AT&T's need to obtain Commission consent to a transfer of control of licenses that the Commission has granted to NCR. However, no license transfer applications have been filed and that matter is not yet before us.[6]

7. Under the Communications Act, Commission approval of AT&T's acquisition of NCR is not required unless and until AT&T applies for transfer of control of NCR in connection with NCR's radio licenses.[7] *Compare* 47 U.S.C. Sections 214, 310(d) (requiring Commission approval, respectively, of acquisitions of communications lines and radio licenses). Nor does the Commission have any rules requiring approval of such an acquisition. In seeking further Commission inquiry, NCR essentially asks us to reimpose a review procedure that we specifically eliminated following an unchallenged Rule Making. Prior to 1986, carriers were required to obtain our approval prior to making an acquisition of certain entities by filing a capitalization plan demonstrating that the acquisition would not detrimentally affect their regulated operations.[8] The capitalization plan requirement codified at Section 64.702(d)(4) of the Commission's rules was adopted to provide Commission oversight of AT&T's (and later the BOCs') creation of new entities to provide customer premises equipment and enhanced services. The prior

approval process served functions other than the need to ensure that the carriers' financing of the *Computer II* ventures did not deprive them of capital required to provide basic service.[9] In 1986, however, the Commission eliminated the capitalization plan requirement, finding that the capitalization plan review was unnecessary and unduly burdensome.[10] The Commission concluded that, in the face of significant market changes and the imposition of certain nonstructural safeguards, "carrier entry into unregulated areas will not lead to massive hemorrhaging of capital from regulated operations."[11] No party ever challenged the propriety of the elimination of the capitalization plan review requirement as it applied to AT&T.[12]

8. Nevertheless, since the Commission retains the discretion to obtain information necessary to assess AT&T's ability to provide regulated common carrier services,[13] we have reviewed the record to determine whether there is any public interest basis for requiring AT&T to submit additional information regarding its attempted acquisition of NCR. While we would be concerned if the record suggested that the acquisition posed a real threat to the viability of AT&T's provision of common carrier services, there is nothing in the record to suggest that this might be the case. Most of NCR's allegations are wholly speculative, and are not sufficient to suggest that a "massive hemorrhaging" would be likely to occur. The primary area of inquiry that NCR attempts to support is its assertion that the merger will place AT&T in a negative cash flow position, and that this fact will adversely affect its ability to provide basic services. NCR's study purporting to support this proposition contains, as AT&T notes, the highly questionable assumption that the bulk of the acquisition cost will be financed through debt instruments that require repayment of principal over eight years. This arrangement is not typical of AT&T's current financing;[14] use of a more traditional long-term issue with deferral of principal payments yields a far different cash flow picture. In any event, even if we could establish that the AT&T post-merger operations might experience some cash flow problems, such a situation would not necessarily translate into network degradation. Investment decisions are made years in advance, and AT&T is now completing an extensive modernization program, including digitization of its network.[15] AT&T is under significant competitive pressures to maintain and improve the quality and efficiency of its network.

9. In view of the foregoing, we conclude that additional inquiry into AT&T's proposed financing is not necessary. Accordingly, we decline to require AT&T to provide further information about the tender offer. We will, of course, continue to monitor closely AT&T's regulated operations to ensure that any purchase of NCR does not degrade AT&T's provision of common carrier services.

10. The second issue is whether there is any need for the Commission to impose additional requirements, restrictions, safeguards or reporting requirements on AT&T's proposed acquisition to ensure that the transaction does not adversely affect either AT&T's ability to invest in its regulated operations or other ratepayer interests. NCR's primary focus is on the perceived need for restrictions on any debt securities necessary to finance the acquisition.[16] We see no justification for such an intrusive measure. The history of carriers' entry into and acquisitions of nonregulated operations does not support the need for action of that nature. AT&T, and other carriers, have throughout the post-divestiture period expanded their nonregulated operations, and our lack of specific additional oversight of the financing thereof has not generated problems that have warranted Commission attention.

11. NCR minimizes the safeguards already in place that limit the possibility that AT&T's acquisition would degrade the network. First, AT&T operates in an environment of strong competition for its long distance services -- a fact that provides disincentives to any action that may adversely affect its ability to provide high quality service. Second, AT&T is subject to a variety of reporting requirements regarding the quality of its service.[17] Any degradation of service quality would be detected, and this Commission has ample authority to require improvement should that need arise. Third, AT&T is now subject to price cap regulation, and the opportunity to shift to ratepayers the costs of unwise nonregulated business decisions is limited. Even if unwise nonregulated investment decisions raise AT&T's cost of capital, any such increase would not automatically raise the price caps applicable to AT&T's services and thus would not necessarily be passed on to ratepayers. Finally, AT&T files annual reports itemizing the separation of its regulated costs from nonregulated costs, and the Commission has in place accounting requirements to ensure that transactions between its regulated and nonregulated entities do not impose costs on ratepayers that the nonregulated entities properly should bear.[18] None of these safeguards existed when the *Computer II* capitalization plan requirement was adopted, but together they provide a strong assurance that AT&T will not be able to impose on ratepayers any adverse consequences of the proposed acquisition. Accordingly, we conclude that no additional safeguards or requirements are required in this matter.

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that NCR's Petition for Emergency Investigation and Special Relief IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] NCR provides a copy of the December 6, 1990 tender offer, which includes the history and details of the offer, as Exhibit A to its petition.

[2] NCR Petition at 31.

[3] *Id.* NCR states that the Commission should prohibit AT&T from mortgaging its regulated assets or guaranteeing the obligations imposed by securities used to permanently finance the acquisition.

[4] NCR Petition at 31, *citing* Amendment of Section 64.702 of the Commission's Rules (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958, 1077 (1986) (*Computer III Phase I Order*), *recon*, 2 FCC Rcd 3035 (1987) *Phase I Reconsideration*

Order), further recon., 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *Computer III Phase I Order and Phase I Reconsideration Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *appeal pending sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir. pet. for rev. filed May 16, 1988); *Phase II Order*, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989), *Phase II Order vacated sub nom. California v. FCC, supra*.

[5] NCR Petition at 25-27.

[6] In its reply, NCR asks the Commission to: (1) require AT&T to file immediately the required transfer of control applications for NCR's private radio licenses; (2) notify AT&T of the sanctions of an unauthorized transfer of control; and (3) not allow AT&T to acquire the proxies to replace the NCR board without prior Commission authorization. NCR Reply at 7-8. We will not impose those requirements. AT&T is presumably aware of the Commission's licensing policies in a takeover situation and will proceed accordingly. That is, if approval of the transfer of control of NCR is not obtained prior to any assumption of control of NCR by AT&T within the meaning of Section 310(d) of the Act, NCR's radio licenses will presumably be excluded from the transaction and promptly returned to the Commission. *See generally* Tender Offers and Proxy Contests, 59 RR 2d 1536 (1986), *appeal dismissed sub nom. Office of Communications of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C. Cir. 1987); Storer Communications, Inc., 101 FCC 2d 434 (1985), *aff'd*, 763 F.2d 436 (D.C. Cir. 1985).

[7] There is no suggestion in the record that NCR owns any telecommunications lines within the meaning of Section 214 of the Act.

[8] *See Memorandum Opinion, Order and Authorization*, 42 FCC 2d 677 (1973); Amendment of Section 64.702 of the Commission's Rules and Regulations (*"Computer II"*), 77 FCC 2d 384, 485 (1980) *(Computer II Report and Order), recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); AT&T Co., 91 FCC 2d 578, 579 (1982), *recon. denied*, FCC 83-424, released Sept. 20, 1983.

[9] *See, e.g., Computer II Report and Order*, 77 FCC 2d at 485 (Commission's first concern in capitalization plan review was to ensure that asset transfers did not serve as vehicles for inappropriate subsidies to the detriment of ratepayers.)

[10] *Computer III Phase I Order*, 104 FCC 2d at 1076-7. The 9th Circuit did not remand the propriety of lifting structural separation for AT&T. The Commission lifted the requirement because the reasons for requiring capitalization plan filings, such as the need for the separate entities to establish financial independence, were being addressed by less burdensome measures. The Commission concluded that a more cogent concern was whether the carriers were attributing the costs of their nonregulated activities to regulated operations. *Id.* at 1077.

[11] *Id.* at 1077. In 1988, the Commission also eliminated the capitalization plan review requirement applicable to the BOCs' cellular radio operations, concluding that the review " . . . is an intrusive form of regulation that potentially places this Commission in the position of second guessing the RBOCs' exercise of their independent business judgment." Amendment of Section 22.901(d) of the Commission's Rules to Eliminate Commission Review of Capitalization Plans for Mobile Radio Cellular Systems, 3 FCC Rcd 3708, 3709 (1988).

[12] As explained in note 10, *supra*, no one challenged, and the 9th Circuit did not disturb, our lifting of structural separation for AT&T. Nevertheless, because the Court vacated the Commission's order, the Commission thereafter considered the issue again. In *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990), *appeals pending sub nom. MCI Telecommunications Corp. v. FCC*, No. 91-1121 (D.C. Cir. pet. for rev. filed March 12, 1991 *and People of the State of California and Public Utilities Commission of California v. FCC*, No. 91-70164 (pet. for rev. filed March 14, 1991), *petitions for recon. pending*, we allowed AT&T to provide enhanced services subject to nonstructural safeguards rather than under the *Computer II* structural separation requirements.

[13] AT&T does not dispute that the Commission has the authority to obtain information about a carrier's nonregulated operations necessary to assess the carrier's ability to provide basic services. *See North American Telecommunications Ass'n. v. FCC*, 772 F.2d 1282 (7th Cir. 1985).

[14] AT&T Opposition at 6.

[15] *See* AT&T Opposition at 9; AT&T 1989 Annual Report at 31.

[16] NCR's request in this regard would be mooted if AT&T were to finance the acquisition through a common stock issue. Although that possibility renders NCR's concerns in this regard speculative, we will nevertheless address its position.

[17] These reporting requirements are described in Policy and Rules Concerning Rates for Dominant Carriers, *Report and Order and Second Further Notice of Proposed Rulemaking*, 4 FCC Rcd 2873 (1989).

[18] These rules are codified at 47 C.F.R. Section 32.27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-140

In the Matter of

Amendment of Part 74 of the
Commission's Rules Concerning
FM Translator Stations

ORDER

Adopted: March 22, 1991; Released: April 2, 1991

By the Chief, Mass Media Bureau

1. This action extends the effective date for rules adopted in the *Report and Order (Report)* in MM Docket No. 88-140 (5 FCC Rcd 7212, 1990) and for lifting the freeze on the acceptability of FM translator applications. The *Report* restructured the Commission's FM translator rules. The *Report* established a March 1 effective date for the rule amendments, and added that the freeze on acceptance of applications for FM translator stations on the commercial band would continue for 60 days after the effective date of the new rules or May 1. This information was verified in a *Public Notice* issued February 26, 1991. However, the full text of the *Report* at paragraph 150 indicated that "Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget . . . ." Such approval is still pending. The effective date for the rules is extended to June 1, 1991, and the date for lifting the freeze to June 1, 1991, to allow for approval of the amended requirements by the Office of Management and Budget (OMB). Applications that have been deferred pending the outcome of this proceeding must be amended to conform to the new rules within 60 days after the freeze is lifted, or by August 1, 1991. Whether these dates will have to be changed again is dependent on approval by the OMB.

2. Accordingly, IT IS ORDERED that the effective date of the amendments to the FM Translator Station rules IS EXTENDED to June 1, 1991.

3. IT IS FURTHER ORDERED that the date for lifting the FM translator application freeze IS EXTENDED to June 1, 1991.

4. IT IS FURTHER ORDERED that applications deferred pending the outcome of this proceeding must be amended to conform to the new rules by August 1, 1991.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.24(b) and 0.283 of the Commission's Rules (47 CFR Sections 0.24(b) and 0.283).

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Local Exchange
Carriers' Individual
Case Basis
DS3 Service Offerings

Southwestern Bell Telephone Company
Revisions to Tariff F.C.C. No. 68
Transmittal No. 2039

US West Communications
Revisions to Tariff F.C.C. No. 1
Transmittal No. 127

ORDER

Adopted: March 21, 1991; Released: March 21, 1991

By the Chief, Common Carrier Bureau:

1. On February 27, 1991, Southwestern Bell Telephone Company (Southwestern) filed an Application for Expedited Review and Petition for Stay of the *Dark Fiber Tariff Order*.[1] US West Communications, Inc. (US West) filed an Application for Review of that Order on March 4, 1991. On March 14, 1991, Williams Telecommunications Group, Inc. (Williams) and Metropolitan Fiber Systems, Inc. (MFS) filed oppositions to Southwestern's Application for Expedited Review and Petition for Stay. In the *Dark Fiber Tariff Order*, the Common Carrier Bureau suspended a portion of the carriers' respective dark fiber charges, instituted an investigation into their rates, and allowed the remaining portion of the charges to take effect.[2]

2. Southwestern requests that the Commission review the *Dark Fiber Tariff Order* and stay its effect until completion of final Commission and judicial review of this Order and Southwestern's application filed pursuant to Section 214 of the Communications Act. [3] Southwestern contends that it has made the requisite showing to support a stay. Specifically, Southwestern asserts that its request for stay satisfies *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) (*Petroleum Jobbers)* (as modified by *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). *See* Southwestern Application at 4. Southwestern claims that it has demonstrated that there is a substantial likelihood that it will prevail on the merits, that it will suffer immediate and irreparable injury if a stay is not granted, that granting a stay will not substantially harm other interested parties, and that granting a stay will advance the public interest. *Id.* at 6-33.

3. In support of its claim that it will likely prevail on the merits, Southwestern contends that the provision of pure dark fiber facilities is not a communication service, that Southwestern has never offered pure dark fiber facilities, and that the Commission lacks authority to require Southwestern to make such an offering against its will. Southwestern also asserts that Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), does not authorize the Commission to prescribe rates for new services, and that even if it did, the Bureau has not complied with Section 204(a). Southwestern further asserts that the Bureau's Order violates the net revenue test and that the Bureau's method underlying its rate prescription is arbitrary. *Id.* at 6-28.

4. In support of its contention that it will suffer immediate and irreparable harm if a stay of the *Dark Fiber Tariff Order* is not granted, Southwestern maintains that: its existing customer base of what it describes as "finished" high capacity special access services will migrate to pure dark fiber, resulting in a net revenue loss of $34,239,058 (reduced to present value) over the next three years; the outcome of its Section 214 Application will be predetermined as a result of the artificial stimulation of pure dark fiber demand; it is being forced to offer a product it would not otherwise offer and deploy its capital and labor in a manner contrary to its business plan; its network configuration could be permanently altered, thus requiring it to devote a portion of its limited capital and labor resources to provision of dark fiber at the expense of other services; its credibility and reputation will be impacted; and its customers will suffer irreparable injury as they will be subscribing to a dark fiber tariff which, when later withdrawn on appeal, will subject the customers to service interruption, reconfiguration of their network, lost investment in electronics, and failed confidence in Southwestern as a communications provider. *See* Southwestern Application at 29-31.

5. In addition, Southwestern contends that a stay will not substantially harm other interested parties. Southwestern also alleges that granting a stay until a full proper inquiry can be made into the numerous issues surrounding the dark fiber offering, will serve the public interest. *Id.* at 31-33.

6. Williams contends that Southwestern's filing is procedurally defective as it seeks to combine separate forms of relief in violation of Section 1.44(e) of the Commission's Rules, 47 C.F.R. § 1.44(e). Williams Opposition at 2-3. Williams argues that Southwestern's stay request showing falls short of what the law requires and must be rejected. *Id.* at 3. First, Williams asserts that Southwestern has not demonstrated a substantial likelihood that Southwestern will prevail on the merits. Williams claims that Southwestern's assertions that the provision of pure dark fiber facilities is not a communications service, that Southwestern has never offered pure dark fiber facilities, and that the Commission lacks authority to require Southwestern to make such an offering against its will are without legal or evidentiary foundation and cannot be reconciled with Southwestern's own past statements and practices. *Id.* at 4. Williams faults Southwestern's reliance on the *Price Cap Order*,[4] arguing that Transmittal 2039 was not a price cap filing, that dark fiber is not a "new" Southwestern service, and that Southwestern's net revenue showing falls far short of that required by the Price Cap rules. *Id.* at 4-5. Williams also disputes Southwestern's claim that the Bureau violated Section 204(a) of the Communications Act,

47 U.S.C. § 204(a), noting that this provision expressly authorizes the Commission to suspend the operation of any new or revised charge in whole or in part. Williams further asserts that, contrary to Southwestern's claim, the Bureau has not prescribed Southwestern's interim rates, but merely mandated a partial suspension. *Id.* at 5-6. In addition, Williams maintains that the Bureau's method for setting the interim rates is not arbitrary, as Southwestern claims. *Id.* at 6-7.

7. Second, Williams contends that Southwestern has not demonstrated that it will suffer irreparable injury if a stay is not granted. Williams asserts that it is well settled that economic loss does not, in and of itself, constitute irreparable harm, citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas*). Williams maintains that Southwestern's irreparable injury arguments are speculative as they are premised on a projected net revenue loss over the next three years which Williams argues is irrelevant because the interim rates which Southwestern wishes to stay will terminate by operation of law within five months. Williams also asserts that requiring Southwestern to continue its provision of dark fiber would cause no harm because Southwestern is already required to construct such facilities as part of its standard DS3 service offering. *Id.* at 7-8.

8. Third, Williams disputes Southwestern's allegation that the grant of a stay will not harm other interested parties. Williams argues that Southwestern's proposed dark fiber rates are grossly excessive, would subvert the Commission's policy goal of protecting dark fiber customers by ensuring that reasonable, generally available dark fiber service is available in a timely manner, would cause significant economic burdens for Williams, and would significantly jeopardize the communications requirements of both Williams and its customers. *Id.* at 8-9 & 10 n.11. Fourth, Williams alleges that, in light of the above, granting Southwestern's petition for stay will not advance the public interest. *Id.* at 10.

9. MFS contends that the provision of dark fiber by Southwestern is subject to regulation under Title II of the Communications Act. MFS argues that Southwestern's claim to the contrary finds no support in the plain language of the Act, or in any Commission precedent, and is contradicted by Southwestern's own prior position in this proceeding in which Southwestern admitted that dry fiber is merely a form of DS3 service and that the market for the two are the same. MFS further maintains that the classification of dark fiber as a common carrier service subject to full Title II regulation is supported by the Commission's *LightNet* decision. MFS also argues that the Commission has been exercising Title II jurisdiction over dark fiber from the inception of the service and that the LECs' accedence to the Commission's jurisdiction, as evidenced by their filing of dark fiber tariffs, is a tacit admission by the LECs that dark fiber is subject to the Commission's jurisdiction. MFS Opposition at 3-6. In addition, MFS argues that Southwestern has not demonstrated that a stay would serve the public interest. MFS argues that continuance of ICB rates for existing customers has a significant harmful impact on competitors. *Id.* at 6-7.

10. The Common Carrier Bureau has reviewed the Southwestern petition and the oppositions of Williams and MFS. We conclude that Southwestern has not demonstrated imminent irreparable injury warranting a stay. In authorizing the suspension of carriers' tariffs in whole or in part pending completion of an investigation of the rates, the Communications Act contemplates the potential that carriers during the suspension period would not collect all the revenues they had proposed to collect in their tariffs. *See FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152 (1962). The Act balanced this potential against the public interest served by barring a carrier from overcharging for essential facilities. The limitation of the suspension period to five months was Congress' chosen means of balancing these competing interests. Suspension orders are not even subject to judicial review because the courts regard such orders as committed to the discretion of the agency. The courts have also found that economic loss, in and of itself, does not constitute irreparable harm for purposes of analyzing stay requests. *See, e.g., Petroleum Jobbers*, 259 F.2d at 925; *Wisconsin Gas*, 758 F.2d at 674. Accordingly, the bare allegation of revenue loss resulting from suspension of a tariff does not constitute irreparable injury warranting a stay.

11. We also conclude that Southwestern's other irreparable injury arguments are speculative and unconvincing. For example, Southwestern's gratuitous concern that its customers will be irreparably harmed at the time the service is withdrawn by Southwestern after appeal seems to assume that Southwestern in fact will prevail upon appeal. We are not impressed by Southwestern's assertions, however, that its petition establishes the groundwork for such an assumption. Moreover, the speculative nature of this purported showing of injury is heightened by the fact that Southwestern would have within its own power the ability to avoid any such injury: it simply could choose to continue making the service available to its customers. Such an action presumably would have the added benefit of maintaining customer confidence in Southwestern as a communications provider. *See id.* at 31. Therefore, Southwestern's petition for stay is denied.

12. On March 21, 1991, the Common Carrier Bureau released a *Modification Order* [5] that makes changes to the *Dark Fiber Tariff Order*. Specifically, the *Modification Order* added a paragraph immediately following paragraph 22 of the *Dark Fiber Tariff Order* which states that: "The per mile per strand rates listed above constitute the base rate which carriers should use to calculate any volume discounts in the rates as they were originally filed. . . . We note that we do not intend by our Order to change any rate structure proposed by the carriers. Therefore, the carriers are free to continue the volume discount structures reflected in their tariffs, if they desire. However, the rate levels for any proposed volume discounts should be calculated using the base rates listed above."

13. This modification may affect the positions taken by Southwestern and US West in their applications for review. Accordingly, we will afford Southwestern and US West an opportunity to amend their applications for review in light of the *Modification Order*. The amended applications for review may be filed no later than April 10, 1991. Oppositions are due no later than April 25, 1991. Should Southwestern or US West choose not to amend its application for review, oppositions to that carrier's application for review as originally filed will be due no later than April 25, 1991. Replies to the oppositions are due no later than May 6, 1991.

14. Accordingly, IT IS ORDERED that the petition for stay filed by Southwestern Bell Telephone Company IS DENIED.

15. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company and US West Communications, Inc., MAY AMEND the subject applications for review as specified in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Bell Atlantic Telephone Companies *et al.*, CC Docket No. 88-136, Memorandum Opinion and Order, DA 91-228, rel. Feb. 22, 1991 (Com.Car.Bur.) (*Dark Fiber Tariff Order*), *pet'n for stay & app. for review pending.*

[2] Southwestern, US West, the Bell Atlantic Telephone Companies, and the BellSouth Telephone Companies had filed general, averaged rates for dark fiber service on November 1, 1990.

[3] 47 U.S.C. § 214. *See* Southwestern Section 214 Application, filed Nov. 2, 1990, File No. W-P-C-6670.

[4] Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786 (1990) (*Price Cap Order*).

[5] *See* Bell Atlantic Telephone Companies *et al.*, CC Docket No. 88-136, Modification of Memorandum Opinion and Order, DA 91-330, released Mar. 21, 1991 (Com.Car.Bur.) (*Modification Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-73

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (New Bern and Oriental, North Carolina) — RM-7609

NOTICE OF PROPOSED RULE MAKING

Adopted: March 22, 1991; Released: April 2, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Conner Media Corporation ("petitioner"), requesting the substitution of Channel 231C3 for Channel 231A at New Bern, North Carolina, and the reallotment of Channel 231C3 from New Bern to Oriental, North Carolina. In addition, petitioner requests the modification of its construction permit for Station WZYH-FM to specify Oriental as the community of license. Petitioner states that it will apply for the channel, if allotted to Oriental.

2. Petitioner states that the allotment of Channel 231C3 to Oriental will provide the community with its first local FM service. It describes Oriental as a resort community on Pamlico Sound and states that the community has been credited with a preliminary 1990 U.S. Census population of 784 persons. Petitioner contends, however, that the population increases seasonally due to tourism. There are presently three FM and three AM stations providing local transmission service at New Bern. Therefore, petitioner asserts that the reallotment of Channel 231 will not deprive New Bern of its only local aural transmission service. In addition, it contends that New Bern will retain reception service from Station WZYH-FM, operating with Class C3 facilities, because the station will provide a 60 dBu signal over New Bern.

3. We believe the proposal warrants further consideration since it could provide Oriental with its first local aural transmission service. The proposal would not deprive New Bern of its only local aural transmission service. Furthermore, the allotment of Channel 231C3 at Oriental is mutually exclusive with the present allotment of Channel 231A at New Bern, since the communities are located approximately 26 kilometers (16.2 miles) apart while the Commission's Rules stipulate a minimum distance separation of 142 kilometers (88.2 miles) for co-channel Class A and C3 allotments. Channel 231C3 can be allotted to Oriental in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.2 kilometers (8.2 miles) west to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's construction permit for Station WZYH-FM to specify operation on Channel 231C3 at Oriental. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Oriental or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
New Bern, North Carolina	231A, 270C1, 293C1	270C1, 293C1
Oriental, North Carolina	–	231C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 24, 1991,** and reply comments on or before **June 10, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Miriam C. Kircher, Esq.
1745 Cy Court
Vienna, Virginia 22182
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 231C3 at Oriental are North Latitude 35-00-02 and West Longitude 76-49-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-531

In the Matter of

Amendment of Section 73.606(b), RM-7497
Table of Allotments,
TV Broadcast Stations.
(Tuscaloosa, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 22, 1991; Released: April 2, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 6613 (1990), issued in response to a petition filed on behalf of Black Warrior Broadcasting (petitioner), proposing the allotment of UHF television Channel 23 to Tuscaloosa, Alabama, as that community's third local commercial television service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. Tuscaloosa (population 75,211),[1] the seat of Tuscaloosa County (population 137,541), is located approximately 80 kilometers (50 miles) southwest of Birmingham. It is served locally by commercial television Stations WDBB(TV) (Channel 17)[2] and WCFT-TV (Channel 33). Also, non-commercial educational Channel *39 is vacant and unapplied for at Tuscaloosa at the present time.

3. We believe the public interest would be served by allotting Channel 23 to Tuscaloosa, since it would provide an additional local commercial television service to the community. As indicated in the *Notice*, UHF television Channel 23 can be allotted to Tuscaloosa in conformity with the minimum distance separation requirements of Section 73.610 of the Commission's Rules, provided the transmitter is located at least 9 kilometers (5.6 miles) southeast of the community [3] to avoid short-spacing to co-channel Station WELF(TV), Dalton, Georgia, and to Station WMAO-TV, Greenwood, Mississippi.[4] Additionally, Channel 23 will require a minus carrier offset.

4. Although the Commission has imposed a freeze on television allotments or applications therefor in certain metropolitan areas, Tuscaloosa is not in one of the affected areas.[5]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 17, 1991,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Tuscaloosa, Alabama	17,23-,33,*39-

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Population figures are from the 1980 U.S. Census.

[2] The *Notice* stated that Channel 17 had been proposed for reallotment to Jasper, Alabama, in MM Docket No. 90-281. *See Notice of Proposed Rule Making*, 5 FCC Rcd 3429 (1990). However, the proposal was subsequently withdrawn and the proceeding was dismissed. *See Report and Order*, adopted March 7, 1991.

[3] Coordinates used for Channel 23 at Tuscaloosa are 33-08-16 and 87-30-26.

[4] Coordinates at the authorized site of Station WELF(TV) at Dalton, Georgia, are 34-57-07 and 85-22-58; coordinates at the licensed site of Station WMAO-TV at Greenwood, Mississippi, are 33-22-34 and 90-32-32.

[5] *See Order*, 52 Fed. Reg. 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-74

In the Matter of

Amendment of Section 73.202(b),	RM-7163
Table of Allotments,	
FM Broadcast Stations.	
(West Palm Beach, Florida)	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 22, 1991; Released: April 2, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Pearl Broadcasting, Inc. (petitioner), requesting the substitution of Channel 221C3 for Channel 221A at West Palm Beach, Florida, and the modification of its license for Station WNGS(FM) to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner states that its proposal would result in an overlap of the proposed Channel 221C3 1mV/m contour and the Grade B contour of Station WCIX(TV), Channel 6, Miami, Florida. Petitioner provides an engineering study demonstrating the effect of allotting Channel 221C3 to West Palm Beach on the availability of all classes of educational stations that are assigned to Zone II. Petitioner states that its request would have no meaningful adverse effect on present or future operations on educational FM Channels 218, 219 or 220, with the exception of the preclusion that would occur for Channel 220A in the market where Station WCIX operates. Petitioner notes that there are very few residents, and no communities of 1,000 persons or more, within the area, as the land is almost completely farmed with large sugar cane fields. There are no existing educational stations in the precluded area. Furthermore, petitioner states that the Channel 220A preclusion will not exist if the application of Station WWFR, Okeechobee, Florida, (BMPED-881004IB) to increase to Class C3 facilities is granted and Channel 221A is assigned to Immokalee as proposed in MM Docket 88-608.[1]

3. We believe the public interest would be served by proposing the substitution of Channel 221C3 for Channel 221A at West Palm Beach, Florida, since it could provide a wide area FM service to West Palm Beach. Channel 221C3 can be allotted to West Palm Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.6 kilometers (7.2 miles) north, in order to avoid a short-spacing to a construction permit for Station WZZR(FM), Channel 224C2, Stuart, Florida.[2] As requested, we also propose to modify petitioner's license to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 221C3 at West Palm Beach or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the fact that West Palm Beach could receive a wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
West Palm Beach, Florida	221A	221C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 24, 1991,** and reply comments on or before **June 10, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Thomas Schattenfield
Susan A. Marshall
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(Attorneys for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Station WCOO(FM), Channel 252A, Immokalee, Florida, was ordered to Channel 221A in MM Docket 88-608, 5 FCC Rcd 4540 (1990).

[2] The coordinates for Channel 221C3 at West Palm Beach are North Latitude 26-49-14 and West Longitude 80-02-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-75

In the Matter of

Amendment of Section 73.202(b), RM-7230
Table of Allotments,
FM Broadcast Stations.
(Conway and Myrtle Beach, South
Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 22, 1991; Released: April 2, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Pinnacle Southeast, Inc. ("petitioner"), requesting the reallotment of Channel 281C1 from Conway, South Carolina, to Myrtle Beach, South Carolina, and the modification of its license for Station WYAV to specify the new community of license.

2. Petitioner states that Myrtle Beach and Conway are located approximately 12 miles apart. It further states that the Census Bureau population estimates as of July 1, 1988, credits Conway with a population of 14,470 persons and Myrtle Beach with 29,730 persons. Petitioner characterizes Myrtle Beach as a growing coastal resort community with a thriving tourist industry. According to petitioner, three FM and two AM stations are licensed to Conway, while two FM and two AM stations are licensed to the larger community of Myrtle Beach.[1] Both communities receive reception service from more than five radio stations. Petitioner contends that the public interest would be served by reallotting Channel 281C1 from Conway to Myrtle Beach because it would provide an additional service to the more populous community of Myrtle Beach while not depriving Conway of its only local broadcast service. It submits that this action comports with the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), and *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). Finally, petitioner states that no change in Station WYAV's transmitter site or channel class is requested as Myrtle Beach is already entirely within the station's 70 dBu contour.

3. We tentatively conclude that adoption of this proposal could result in a preferential arrangement of allotments since Myrtle Beach has a substantially larger population than Conway but receives less local aural transmission service. We have confirmed that Channel 281C1 can be allotted to Myrtle Beach in compliance with the Commission's minimum distance separation and other technical requirements from the station's present transmitter site.[2] As requested, we also propose to modify Station WYAV's license to specify Myrtle Beach as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such parties.

4. We believe the public interest would be served by affording interested parties an opportunity to comment on the proposed reallotment of Channel 281C1 from Conway to Myrtle Beach, South Carolina, since it could provide the larger and less well-served community of Myrtle Beach with an additional wide coverage area FM service without depriving Conway of its only existing local radio service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Conway, South Carolina	230A, 281C1	230A
Myrtle Beach, South Carolina	221C1, 269C2	221C1, 269C2, 281C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 24, 1991,** and reply comments on or before **June 10, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Scott A. McCreight, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte*

presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] One of Conway's FM stations, WHMC-FM, is a noncommercial educational station. Noncommercial stations are relevant in determining the number of FM transmission services authorized to a community. *See Valley Broadcasters, Inc.*, 5 FCC Rcd 2785 (1990), and *Brunswick and Waycross, Georgia*, 5 FCC Rcd 4014 (1990).

[2] The coordinates for this allotment are North Latitude 33-35-27 and West Longitude 79-02-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-76

In the Matter of

Amendment of Section 73.202(b), RM-7647
Table of Allotments,
FM Broadcast Stations.
(Reserve, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 22, 1991; Released: April 2, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Virgie Hare du Treil ("petitioner") requesting the substitution of Channel 235C3 for Channel 235A at Reserve, Louisiana, and the modification of his construction permit to specify operation on the higher powered channel. Petitioner states that he will apply for Channel 235C3, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 235C3 for Channel 235A at Reserve, Louisiana, since it could provide the community with a wide coverage area FM service. Channel 235C3 can be allotted to Reserve in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.0 kilometers (13.1 miles) southwest of the community.[1] We are imposing a site restriction to avoid short-spacings to five of the six pending applications for the vacant but now applied for Channel 234A at Lacombe, Louisiana.[2] The use of the site restriction does not obviate the spacing conflict with the pending application filed by Lacombe Community Broadcasters, Inc. ("Lacombe") (BPH-890123MX) for Channel 234A at Lacombe. However, as is well established Commission policy, rule making proposals which provide new service benefits are generally preferred over an application which represents a preference for a particular site. *See Andalusia, AL*, 49 FR 32201, August 13, 1984, *Las Vegas, NV*, 51 FR 9453, March 19, 1986. Therefore, a copy of this *Notice of Proposed Rule Making* will be served on Lacombe to advise the applicant that it may be required to amend its application to specify a nonconflicting site, in the event Channel 235C3 is ultimately allotted to Reserve. In addition, we shall propose to modify the petitioner's construction permit for Channel 235A, to specify operation on Channel 235C3 in accordance with Section 1.420(g) of the Commission's Rules, as requested. Therefore, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional equivalent channel for use by interested parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Reserve, Louisiana	235A	235C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Return Receipt Requested, to the following applicant for Channel 234A at Lacombe: Lacombe Community Broadcasters, Inc., P.O. Box 568, Covington, Louisiana 70434.

6. Interested parties may file comments on or before **May 24, 1991,** and reply comments on or before **June 10, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Virgie Hare du Treil
1500 East Airline Highway
LaPlace, Louisiana 70068
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 235C3 at Reserve, Louisiana, are North Latitude 29-58-37 and West Longitude 90-45-01. Petitioner proposed coordinates of North Latitude 30-00-44 and West Longitude 90-46-30 for the allotment. A Commission engineering analysis indicates that operation from this site would not provide required city grade signal coverage to Reserve.

[2] The pending applications for Channel 234A at Lacombe, Louisiana, have been designated for hearing. *See* MM Docket No. 90-590, 6 FCC Rcd 57 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-77

In the Matter of

Amendment of Section 73.202(b), RM-7644
Table of Allotments,
FM Broadcast Stations.
(Pentwater, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 22, 1991; Released: April 2, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by C&S Broadcasting, Inc. ("petitioner"), requesting the substitution of FM Channel 231C3 for Channel 231A at Pentwater, Michigan. Petitioner also requests modification of its construction permit for Station WSAB, Channel 231A, to specify operation on Channel 231C3. Petitioner provided an engineering study in support of the proposal and indicated it would file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide a wide coverage area station to Pentwater, Michigan. Channel 231C3 can be allotted to Pentwater, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[1] Since Pentwater is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government will be requested for this allotment. We shall also propose to modify the construction permit for Station WSAB, Channel 231A, to specify operation on Channel 231C3 in accordance with Section 1.420(g) of the Commission's Rules, and will not accept competing expressions of interest for use of the channel or require petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Pentwater, Michigan	231A, 276A	231C3, 276A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 24, 1991,** and reply comments on or before **June 10, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

C&S Broadcasting, Inc.
7640 Ravenswood Drive
Portage, Michigan 49002
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 231C3 are 43-46-38 and 86-26-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-69

In re Applications of

CLASSIC RADIO, INC. (hereafter "Classic")	File No. BPH-890928MF
MEL-MIKE ENTERPRISES, INC. (hereafter "Mel-Mike")	File No. BPH-890928MJ
CHARLES N. AND ESTHER L. MORRIS, *ET. AL.* (hereafter "Morris")	File No. BPH-890928MN (Dismissed Herein)

For Construction Permit
for a New FM Station on
Channel 237C2 (95.3 MHz)
in Central, New Mexico

HEARING DESIGNATION ORDER

Adopted: March 15, 1991; Released: April 2, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Morris*. The Central allocation in this proceeding is a Class C2 allotment domestically and, pursuant to 47 C.F.R. §73.207(b)(3) and the provisions of the 1972 Agreement Between the United States of America and the United Mexican States Concerning Frequency Modulation Broadcasting in the 88 to 108 MHz Band, 24 U.S.T. 1815, T.I.A.S. No. 7697 (U.S.- Mexican Agreement), is considered a Class B internationally. The U.S. - Mexican Agreement, *inter alia*, imposes strict limitations on the power, height and proximity of domestic FM stations near the Mexican border areas. An engineering review of the Morris proposal indicates that the ERP and HAAT parameters exceed the U.S.-Mexican Agreement limitations specified for international Class B stations within 320 kilometers of the Mexican border.

3. Although the adoption of the technical rules in Docket 80-90, 48 Fed. Reg. 29486 (June 27, 1983), changed the station classifications and maximum parameters, FM stations within 320 kilometers of the United States-Mexican border area must still comply with the bilateral U.S.- Mexican Agreement. *See Public Notice* entitled "Commission Reaffirms that the U.S.-Mexican Agreement of 1972 is Still in Effect", December 23, 1985. Moreover, the Commission's rules for FM radio stations place the responsibility for compliance with the U.S.-Mexican Agreement squarely on the applicant and not on the Commission's processing line. Applications that fail to comply with international broadcasting agreements are unacceptable for filing and are, thus, summarily dismissed. *See Pueblo Radio Broadcasting Service*, 5 FCC Rcd 6278 (1990); *Kerrville Radio*, 2 FCC Rcd 3441 (1987); *1010 Broadcasting, Inc.*, 59 RR 2d 1124 (1986).

4. Consistent with the "hard look" processing procedures for new FM applications adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), it was Morris' responsibility to review its application to ensure its acceptability. *See, e.g., R.A.D. Broadcasting Corporation*, 4 FCC Rcd 4772 (1989), *appeal dismissed* No. 89-1413 (D.C. Cir. Feb 27, 1990). The "hard look" procedures state that antenna height and power are evaluated in the course of an acceptability study and that those parameters may be affected by international agreements. Moreover, the instructions to FCC Form 301 admonish applicants to familiarize themselves with the Commission rules, which make specific reference to the U.S.- Mexican Agreement. *See* , *Kerrville*, 2 FCC Rcd at 3442. *Kerrville* and other precedent make clear that applicants are on notice that the provisions of the international agreements may affect the acceptability of their applications.

5. The Morris application acknowledges that the proposed site lies within 320 kilometers of the Mexican border and that the U.S.- Mexican Agreement must consequently be given consideration. However, within the technical narrative of the application, Morris calls upon the Commission to notify the Mexican government of its overpower/overheight proposal so as to obtain Mexican concurrence for designation as an international Class C for allocation purposes. In the alternative, if concurrence is not forthcoming, Morris requests waiver of the U.S.-Mexican Agreement or any applicable Commission rule provisions.

6. The Commission's "hard look" criteria maintain that an applicant cannot avoid dismissal of its proposal by assigning the responsibility for compliance with its acceptability criteria to the processing line. The "hard look" processing procedures were intended to place a greater burden on the applicant in order to make more efficient use of Commission staff and resources in an effort to provide service to the public expeditiously. Furthermore, the Commission has no authority to unilaterally waive the provisions of a treaty. *1010 Broadcasting, Inc.*, 59 RR 2d at 1125. An application's acceptability is governed by the treaty provisions in force at the time the application was filed. *Id.* at 1125.

7. Thus, Morris had notice of the existence of the U.S.-Mexican Agreement, as well as the responsibility to conform its proposal to the terms of that treaty by the close of the period for filing amendments as of right to insure that its application would be found acceptable for filing. To unilaterally negotiate a treaty provision on Morris' behalf, or to accept an amendment at this point in time, after the close of the amendment as of right period, would be unfair to the other applicants in this proceeding who fully complied with our acceptability criteria as of the amendment as of right date. *See, PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988); *See* also, *Emmy Hahn Limited Partnership*, 4 FCC Rcd 8336 (1989); *Domega Broadcasting Corporation*, 4 FCC Rcd 1450 (1989). Failing in this regard, Morris' application will be dismissed herein as inadvertently accepted for filing.

8. KJJJ(FM), Clifton, Arizona, filed a petition for Rule Making proposing the substitution of Class C Channel 271 for Channel 237A. *See, Report and Order* in MM Docket 85-334, 2 FCC Rcd 452 (1987). Subsequent to this Rule Making proceeding, KJJJ(FM) filed a construction permit application (BMPH-861210ID) to implement the channel change. This construction permit was granted on November 30, 1987. To date, a license to cover the construction permit application has not been filed. The Central applications being considered in this proceeding conflict with the KJJJ(FM) assignment on Channel 237A. However, no conflict exists with the proposed KJJJ(FM) facility on Channel 271C. Accordingly, program tests for the successful Central applicant will not commence until program tests for KJJJ(FM) on Channel 271C commence. Likewise, a license will not be granted for the successful Central applicant until a license is granted for KJJJ(FM) on Channel 271C. This condition will be reflected on the construction permit issued in this proceeding.

9. *Classic*. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Classic may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. Section 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. Section 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. Section 1.1311. 47 C.F.R. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Classic's proposal may have a significant environmental impact as defined by 47 C.F.R. Section 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. Section 1.1311. This study must include the cumulative effects of the proposed operation and all nearby RF sources. In this regard, if the site is presently fenced in compliance with the guidelines, Classic is required to so state and give the distance from the base of the tower to the fence. Accordingly, Classic will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. Section 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of Classic's Environmental Assessment, that Classic's proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Judge shall thereafter not consider the environmental effects of the proposal. *See* Section 1.1308(d) of the Commission's Rules.

10. Classic petitioned for leave to amend its application on October 9, 1990. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Classic in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. Sections 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the Morris application IS HEREIN DISMISSED as inadvertently accepted for filing.

14. IT IS FURTHER ORDERED, That the ultimate construction permit issued in the Central proceeding will be conditioned as specified in paragraph 8.

15. IT IS FURTHER ORDERED, That in accordance with paragraph 9 above, Classic shall submit the environmental assessment required by 47 C.F.R. Section 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

16. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Classic IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Di-

vision, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-68

In re Applications of

DONNA M. MAVRITTE (hereafter "Mavritte") File No. BPH-891011MH

ADVANCED RADIO SYSTEMS, INC. (hereafter "Radio") File No. BPH-891012ML

RAPPAHANNOCK COMMUNICATIONS GROUP, INC. (hereafter "Group") File No. BPH-891012NA

For Construction Permit
for a New FM Station on Channel 245A
in Bowling Green, Virginia

HEARING DESIGNATION ORDER

Adopted: March 15, 1991; Released: April 2, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* A preliminary examination of these applications reveals that the entire allocation for Channel 245A at Bowling Green, Virginia is short-spaced to a pending, proposed reallotment of Channel 243B to Mechanicsville, Virginia. *See Table of Allotments* (Notice of Proposed Rule Making), MM Docket No. 90-67, 5 FCC Rcd 1124 (1990). Nonetheless, the applicants for the Bowling Green allotment will be allowed to proceed to comparative hearing. However, we will condition any construction permit awarded as a result of this proceeding upon the outcome of MM Docket No. 90-67.

3. *Antenna Height.* An engineering study of Mavritte's application reveals a discrepancy with respect to the indicated values for the proposed antenna tower's overall height above ground (OHAG). Specifically, in Section V-B, Item 7(a)(2) of the application and the tower sketch (Figure 1), the listed OHAG is 100 meters. However, the engineering narrative in the application indicates an OHAG of 58 meters. Because the 58-meter figure corresponds with the site elevation above mean sea level provided in the application and confirmed by a site map, and the other engineering data contained in Section V-B is consistent with the 100-meter OHAG figure, the discrepancy appears to be only a minor typographic error in the narrative and therefore does not affect the acceptability of the application. Nevertheless, Mavritte will be required to file a clarifying amendment with the presiding Administrative Law Judge.

4. *Transmitter site.* A review of Radio's application reveals that the narrative description of its transmitter site, location as stated in FCC Form 301, Section V-B, Item 2(a) and the tower sketch (Exhibit 1), is given as 1 mile *west* of the intersection of VA routes 656 and 690. However, the coordinates on the topographic site map (Exhibit 4) and elsewhere in the application consistently show the location of the transmitter site as being 1 mile *east* of that intersection. Consequently, it is clear that the narrative statements are erroneous. Therefore, Radio shall file a corrective amendment with the presiding Administrative Law Judge.

5. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of MM Docket No. 90-67.

9. IT IS FURTHER ORDERED, That Mavritte shall file the amendment, as specified in Paragraph 3 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That Radio shall file the amendment, as specified in Paragraph 4 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Com-

munications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

FRED W. DANIEL File No. 31757-CD-P/L-89
d/b/a ORION TELECOM

For facilities in the
Public Land Mobile Service
at Elsimore, California

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1991; Released: April 2, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Fred W. Daniel, d/b/a Orion Telecom, (Orion) filed the captioned application seeking authority to construct and operate a new station on frequency 454.475 MHz in the Public Land Mobile Service at Elsimore, California. On November 3, 1989, Pacific Bell filed a petition to deny Orion's application. In its petition, Pacific Bell argues that Orion's application should be dismissed because the proposed station will cause harmful interference to Pacific Bell's existing co-channel station or, in the alternative, should not be granted until Orion can demonstrate interference-free operation. Orion filed an opposition, and Pacific Bell has replied. For the reasons set forth herein, we deny Pacific Bell's petition.

II. DISCUSSION

2. In its petition, Pacific Bell argues that Orion has used non-standard Carey[1] calculations to determine the interference potential to Pacific Bell's co-channel station at Anaheim, California (station KME432). In this regard, Pacific Bell notes that, although the actual antenna height above average terrain for the Pacific Bell station is -103 feet, Orion has calculated its interference potential to the Pacific Bell station by assuming that the Pacific Bell station is operating at a height above average terrain of one foot. Pacific Bell argues that Orion should have set the value of the height above average terrain for its Anaheim station at 100 feet because field strength curves used in the Carey formula do not have height curves where antenna heights are below 100 feet. Pacific Bell argues that Orion's extrapolation of the Carey curves below 100 feet is an unacceptable engineering practice. Therefore, Pacific Bell requests that Orion's application should not be granted until Orion has amended the interference calculations in its application to show interference-free operation to Pacific Bell's Anaheim station consistent with the Carey Report.

3. In its opposition, Orion states that the interference calculations in its application comply with acceptable engineering practices. It points out that its co-channel interference calculations were prepared using the Commission's computerized interference program which assigns a one foot height to an antenna with a negative antenna height above average terrain. Orion concludes that based on its reliance on the Commission's interference study, its application demonstrates that its proposed station will not cause interference to Pacific Bell's Anaheim station.

4. In its reply, Pacific Bell continues to argue that Orion's application fails to demonstrate the absence of interference to its Anaheim station using acceptable industry standards.

5. The Commission has a computer program which calculates the Carey formula so that the staff can readily make an independent interference calculation when processing applications. The Commission's program has extended the Carey curves in FCC Report R-6406 to include antenna heights as low as one foot above average terrain. Based on our review of Orion's interference study and the staff interference analysis, we find that Orion's application provides protection to Pacific Bell's Anaheim station. In addition, we find that Orion's use of the Commission's interference program, which extrapolates the Carey curves for a negative height above average terrain, is an acceptable engineering practice.

III. ODERING CLAUSES

6. Accordingly, IT IS ORDERED THAT The Petition to Deny filed by Pacific Bell is DENIED.

7. IT IS FURTHER ORDERED THAT the application of Fred W. Daniel d/b/a Orion Telecom (File No. 31757-CD-P/L-89) is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] FCC Report No. R-6406, "Technical Factors Affecting the Assignment of Facilities in the PLMS," Carey, Roger B., issued June 24, 1964 (Carey Report). This report sets forth the methodology that is to be used to determine the desired-to-undesired field strength ratios along a station's reliable service area contour.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-29

In the Matter of

Amendment of Section 73.202(b),	RM-4941
Table of Allotments,	RM-5399
FM Broadcast Stations.	
(Greenup, Kentucky and Athens, Ohio)	

ERRATUM

Released: April 2, 1991

By the Acting Chief, Mass Media Bureau:

The *Memorandum Opinion and Order* in the above-captioned proceeding, FCC No. 91-61, released March 11, 1991, is corrected to change paragraph 16 by deleting the reference to Channel 282A at Athens, Ohio. In addition, the effective date is corrected to specify May 3, 1991. Paragraph 16 is amended to read as follows:

16. Accordingly, pursuant to authority contained in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r) and 307(b), IT IS ORDERED, That effective May 3, 1991, the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with respect to the following communities:

City	Channel No.
Greenup, Kentucky	289B1
Athens, Ohio	288A

FEDERAL COMMUNICATIONS COMMISSION

Roderick K. Porter
Acting Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-70

In re Applications of

JAMES EUGENE HODGES (hereafter "Hodges")	File No. BPH-890920MF
ET COMMUNICATIONS, INC. (hereafter "ETC")	File No. BPH-890921MD
LEE COUNTY BROADCASTING, INC. (hereafter "Lee")	File No. BPH-890921MM
SHIRLEY A. CASWELL (hereafter "Caswell")	File No. BPH-890921MV
WHATLEY COMMUNICATIONS, A GENERAL PARTNERSHIP (hereafter "Whatley")	File No. BPH-890921MW
OPELIKA RADIO ASSOCIATES (hereafter "ORA")	File No. BPH-890921MP (DISMISSED HEREIN)

For Construction Permit
for a New FM Station
in Opelika, Alabama
Channel 244A (96.7 MHz)

HEARING DESIGNATION ORDER

Adopted: March 15, 1991; Released: April 3, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* ORA proposes to place its transmitting antenna on a new tower at the W. C. Davis Industrial Park in Opelika. In Section V-B, Item 2 of its application, ORA lists the coordinates for this tower as 32 degrees-41 minutes-07 seconds North Latitude, 85 degrees-20 minutes-30 seconds West Longitude. According to our analysis of its site map (Exhibit No. A), the correct coordinates are 32 degrees-41 minutes- *56 seconds* North Latitude, 85 degrees- *21 minutes - 18 seconds* West Longitude. Since there is no evidence within the application as a whole to resolve this discrepancy, it is impossible to determine whether the proposal is in compliance with the Commission's Rules. This data, consistently specified, is critical to processing the application. An inconsistent set of coordinates makes it impossible to determine the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval. Further, an inconsistent set of coordinates makes it impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. Finally, the exact coordinates are necessary in determinations regarding protection to FCC monitoring facilities and to radio quiet zones (*see* 47 C.F.R. § 73.1030), and are essential in staff analysis of an application's environmental impact and its electromagnetic effects on nearby communications facilities. Accordingly, ORA's application must be dismissed as inadvertently accepted for filing.[1] *See, e.g., Steven B. Courts*, 4 FCC Rcd 4764 (1989).

3. *Lee.* Engineering study reveals a discrepancy in Lee's application. Section V-B, Item 7(a)(1) of the application lists the proposed antenna site as 253 meters above mean sea level (AMSL), whereas the topographic map submitted as Exhibit 5 to the application shows the site to be 238 meters AMSL. This discrepancy does not affect the acceptability of the application, since use of either value will not result in a violation of the Commission's technical rules. However, Lee will be required to amend its application to specify the site's correct height AMSL.

4. *Other Matters.* Both Hodges and ETC propose to sidemount their antennas on a tower controlled by Phillip J. Burns, licensee of WNKS347, Opelika, Alabama. However, the tower data submitted in question 7, section V-B of FCC Form 301 by both applicants is inconsistent with that contained in the Commission's records. They both list the antenna's overall height above ground level as 151 meters and its overall height above mean sea level as 422 meters, while Commission records indicate the heights to be 152.4 meters and 423.7 meters, respectively. Because both Hodges and ETC propose to locate on an existing tower licensed to an existing Commission licensee, and because specific reference is made to the existing tower in their applications, the staff could confidently and reliably verify the pertinent tower heights by taking official notice of the tower parameters found in the Commission's records for the licensed facility. However, Hodges and ETC will be required to file amendments with the presiding Administrative Law Judge, within 30 days of the release of this Order, clarifying the tower height discrepancies.

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after January 10, 1990, the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE AMENDMENT FILED
ETC	February 21, 1991
Lee	March 21, 1990
Caswell	December 14, 1990

6. Data submitted by the applicants indicate there would be a significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That the application filed by ORA IS HEREBY DISMISSED as inadvertently accepted for filing, and the petition filed by Whatley to deny or dismiss ORA's application IS DISMISSED as moot.

10. IT IS FURTHER ORDERED, That Lee shall file an amendment clarifying its antenna site height above mean sea level with the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That Hodges and ETC shall submit amendments in accordance with paragraph 4 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by ETC, Lee, and Caswell ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] In view of the above action, the "Petition to Dismiss or Deny" ORA's application, filed by Whatley, will be dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of C-Band Satellite Orbital Spacing Policies to Increase Satellite Video Service to the Home — RM-7627/7628

ORDER

Adopted: March 26, 1991; Released: March 27, 1991

By the Chief Domestic Facilities Division:

1. Petitioners have filed a request for an extension of time in which to file reply comments in the above captioned proceeding.

2. Accordingly, pursuant to the Commission's rules on delegations of authority, 47 C.F.R. 0.291, the Petitioner's request is granted and parties have until April 19, 1991 to file reply comments.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-78

In the Matter of

Amendment of Section 73.202(b), RM-7582
Table of Allotments,
FM Broadcast Stations.
(Osceola, Arkansas and Millington,
Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 22, 1991; Released: April 3, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Diamond Broadcasting, Inc. (petitioner), permittee of Station KPYR(FM), Channel 251C,[1] Osceola, Arkansas, requesting the reallotment of its channel to Millington, Tennessee, and the modification of its license accordingly.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules. In this regard, petitioner advises that the requested change to Millington is mutually exclusive with the allotment of Channel 251C at Osceola, and that it does not intend to move from its presently authorized transmitter site.[2] Petitioner states that operating from its present site with existing facilities, Station KPYR(FM) places a 70 dBu signal over the entire community of Millington. Petitioner adds that Osceola (population 8,881), [3] has one FM station and one fulltime AM facility (Station KOSE(AM)) whereas Millington (population 20,236), has one fulltime AM facility only (Station WMPS(AM)). Thus, petitioner's proposal could bring a first local FM service to Millington, and would not deprive Osceola of local service.

3. A staff review of petitioner's proposal confirms that Channel 251C can be allotted to Millington in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[4]

4. We believe the public interest would be served by the proposed reallotment of Channel 251C from Osceola, Arkansas to Millington, Tennessee, since it could provide the latter community with its first local FM transmission service. Therefore, we shall propose to modify Station KPYR(FM), Osceola, Arkansas, as requested, to specify Millington, Tennessee, as its community of license. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Millington.

5. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments. Section 73.202(b) of the Commission's Rules with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Osceola, Arkansas	251C	--
Millington, Tennessee	--	251C

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **May 28, 1991,** and reply comments on or before **June 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Stanley S. Neustadt, Esq.
April McClain-Delaney, Esq.
Cohn and Marks
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner is presently licensed on Channel 251C2 at Osceola. However, it was modified to specify operation on Channel 251C in MM Docket No. 88-146, 4 FCC Rcd 1763 (1989), for which it has been issued a construction permit (File No. BPH-890828JK).

[2] Coordinates at the site specified in the construction permit issued to Station KPYR(FM) at Osceola are 35-28-03 and 90-11-27.

[3] Population figures are from the 1980 U.S. Census.

[4] Coordinates used in this determination are those at the authorized site of Station KPYR(FM), as indicated above.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-79

In the Matter of

Amendment of Section 73.202(b),	RM-7641
Table of Allotments,	RM-7648
FM Broadcast Stations.	
(Pierce and Bloomington, Texas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 22, 1991; Released: April 3, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration are two interrelated petitions for rule making. The first petition, filed by Fred W. Hannel, d/b/a Trident Broadcasting of Texas, requests the allotment of Channel 296A to Pierce, Texas, as that community's first local FM service. The second petition, filed by Tschirhart Broadcasting, Inc. ("Tschirhart"), requests the substitution of Channel 295C3 for Channel 295A at Bloomington, Texas, and modification of its construction permit for Channel 295A to specify operation on the higher powered channel. The respective proponents stated their intention to apply for the channels, if allotted.

2. An engineering analysis reveals the site proposed by Tschirhart for Channel 295C3, Bloomington, Texas, would be short-spaced to proposed allotment of Channel 296A at Pierce, Texas. However, we believe the public interest would be served by seeking comments on both proposals, as the allotment of Channel 296A at Pierce would provide that community with its first local FM service, and the substitution of Channel 295C3 for Channel 295A at Bloomington would provide that community with an expanded coverage area FM service.

3. Channel 296A can be allotted to Pierce in compliance with the Commission's minimum distance separation requirement with a site restriction of 14 kilometers (8.7 miles) south of the community in order to avoid a short-spacing to the site specified in the construction permit for Station KJZS, Channel 295C, Conroe, Texas.[1] An alternate site or channel could not be found for the Pierce allotment. Channel 295C3 can be allotted to Bloomington in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.3 kilometers (7.6 miles) east to accommodate petitioner's desired transmitter site.[2]. We note that use of this site conflicts with the Pierce allotment proposal. However, an engineering analysis has found an alternate site 10.1 kilometers (6.3 miles) southeast of Bloomington which would avoid the conflict. [3] Since Bloomington is within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government will be requested. Pursuant to Section 1.420(g) of the Commission's Rules, we shall propose to modify the construction permit (BPH-890731MI) to specify the higher powered channel without entertaining other expressions of interest or requiring Tschirhart to demonstrate the availability of an additional equivalent class channel.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pierce, Texas	--	296A
Bloomington, Texas	295A	295C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 28, 1991,** and reply comments on or before **June 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Fred W. Hannel
Trident Broadcasting of Texas
911 Edward Street
Henry, Illinois 61537
(Petitioner for Pierce)

Larry S. Tschirhart, President
Tschirhart Broadcasting, Inc.
7439 Alverstone Way
San Antonio, Texas 78250
(Petitioner for Bloomington)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding.

However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 296A at Pierce, are North Latitude 29-06-45 and West Longitude 96-11-35.

[2] The petitioner's proposed coordinates for Channel 295C3 at Bloomington are North Latitude 28-39-14 and West Longitude 96-46-17.

[3] The coordinates for Channel 295C3 at Bloomington are North Latitude 28-33-36 and West Longitude 96-51-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-80

In the Matter of

Amendment of Section 73.202(b), RM-7672
Table of Allotments,
FM Broadcast Stations.
(Derby Center, Vermont)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 25, 1991; Released: April 3, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Steele Communications Company, Inc. (petitioner), permittee of Station WMOO(FM), Channel 221A, Derby Center, Vermont, requesting the substitution of Channel 221C3 for Channel 221A at Derby Center, and the modification of its authorization to specify operation on the higher powered channel.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 221C3 for Channel 221A at Derby Center, since it could enable Station WMOO(FM) to expand its coverage area. Channel 221C3 can be allotted to Derby Center in compliance with the Commission's minimum distance separation requirements with respect to all domestic allotments, with a site restriction of 5.4 kilometers (3.4 miles) northeast at the site specified in Station WMOO(FM)'s construction permit.[2] The site restriction imposed on Channel 221C3 at Derby Center does not obviate the short-spacings to Station CBMB(FM), Channel 218A, Sherbrooke, Quebec, and to unoccupied Channel 221A at Drummondville, Quebec, Canada. However, we have confirmed that petitioner's proposed use of a directional antenna should protect the Canadian channels. Therefore, we have sought Canadian concurrence in the allotment of Channel 221C3 at Derby Center as a specially negotiated allotment since Derby Center is located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 221C3 at Derby Center or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Derby Center, Vermont	221A	221C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 28, 1991,** and reply comments on or before **June 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jonathan D. Blake, Esq.
William H. Fitz, Esq.
Covington & Burling
P.O. Box 7566
Washington, D.C. 20044
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner fails to state that it will apply for the channel, if allotted. We will permit petitioner to correct this error in its comments. *See* Paragraph 2 of the Appendix to this *Notice*.

[2] The coordinates for Channel 221C3 are North Latitude 44-58-23 and West Longitude 72-04-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-564

In the Matter of

Amendment of Section 73.202(b), RM-7469
Table of Allotments,
FM Broadcast Stations.
(Waynesboro, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 25, 1991; Released: April 3, 1991

By the Chief, Allocations Branch:

1. At the request of Pioneer Radio FM, Inc., permittee of Station WTNR(FM), Channel 235A, Waynesboro, Tennessee (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7048 (1990), proposing the substitution of Channel 235C3 for Channel 235A at Waynesboro, Tennessee, and modification of its authorization to specify operation on the higher powered channel. Petitioner filed supporting comments reaffirming its intention to modify Station WTNR(FM) to Class C3 facilities. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 235C3 for Channel 235A at Waynesboro, since it would provide Waynesboro with a wide coverage area FM service. Channel 235C3 can be allotted to Waynesboro in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station WTNR(FM)'s construction permit.[1] As proposed, we will also modify petitioner's authorization for Station WTNR(FM) to specify operation on Channel 235C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 20, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Waynesboro, Tennessee	235C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit (BPH-890104MC) of Pioneer Radio FM, Inc. for Station WTNR(FM), Waynesboro, Tennessee, IS MODIFIED to specify operation on Channel 235C3, in lieu of Channel 235A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 235C3 at Waynesboro are North Latitude 35-14-04 and West Longitude 87-42-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 3, 1991

Report No. DS-1066

AUTOMATIC TRANSMITTER IDENTIFICATION SYSTEM WAIVER

In the First Report and Order of Docket 86-337, An Automatic Transmitter Identification System for Radio Transmitting Equipment, the Commission indicated that the adopted 7.1 MHz subcarrier frequency might be incompatible with certain video transmission uplinks (47 C.F.R § 25.308(d)(1)). It was anticipated that the Common Carrier Bureau would review user requests for additional subcarrier frequencies and grant waivers as justified to support other video modulation schemes.

We have received several requests for a frequency of 8.3 MHz. One applicant states that there are about 20,000 integrated receiver decoders presently in use in earth stations that are unable to operate at 7.1 MHz because of the design of these decoders. Industry technical personnel appear to support 8.3 MHz as workable and desirable for certain applications such as B-MAC transmissions.

We agree that an additional ATIS subcarrier assignment is justified. Accordingly, a waiver is granted to use 8.3 MHz +/-25 kHz on an elective basis in lieu of the value specified in Section 25.308(d)(1) of the Commission's Rules. 47 C.F.R. § 25.308(d)(1).

This waiver is granted under the delegated authority of the Chief, Common Carrier Bureau. For further information on the matter contact John Hudak (202) 632-6977 or Roger Herbstritt (202) 634-4076.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications
Revisions to Tariff F.C.C. No. 1

Transmittal No. 148

ORDER

Adopted: March 26, 1991; Released: March 27, 1991

By the Deputy Chief, Common Carrier Bureau:

1. On March 7, 1991, US West Communications (US West) filed Transmittal No. 148 to adjust, within established price cap bands, several rates in its interstate access service tariff. Specifically, US West would reduce its Local Transport Facility and Directory Assistance rates, and would increase its Local Switching rates. For Special Access, US West would reduce its Voice Grade, WATS, Metallic and Telegraph, and Audio and Video rates, and would increase its rates for High Capacity DS1 and DS3 services and Digital Data Service. Transmittal 148 is scheduled to become effective March 28, 1991.

2. On March 14, 1991, Williams Telecommunications Group, Inc. (WTG) filed a petition to reject or suspend and investigate Transmittal 148. MCI Telecommunications Corporation (MCI) also filed a petition on March 14, 1991 to suspend and investigate Transmittal 148.

3. Petitioners contend that US West provides no evidence that these rate changes are based on changing costs. MCI Petition at 2-3; WTG Petition at 3-4. Therefore, petitioners assume that these rates amount to strategic pricing. MCI Petition at 2; WTG Petition at 3. MCI also argues that US West's rates might have discriminatory ramifications and that if US West continues this type of pricing behavior, switching costs will increase almost 20 percent during the first four years of price cap regulation. MCI Petition at 2. In addition, MCI maintains, US West is attempting to "suppress customers' intentions to modernize networks by migrating from analog facilities to digital facilities" because US West is decreasing voice grade rates and increasing high capacity rates. *Id.* at 2-3.

4. WTG claims that US West failed to support adequately its filing and that the carrier's rates fall above band. WTG Petition at 3. According to WTG, Transmittal 148 does not comply with Sections 61.49(a) and (b) of the Commission's Rules, 47 C.F.R. §§ 61.49(a),(b), by providing an explanation or detailed evidentiary showing to support its new rates. *Id.* at 2-3. WTG argues that even using US West's own working papers, the revenues for DS3 service will amount to a 5.9 percent increase from its base period revenues. *Id.* at 3.

5. In its reply, filed March 20, 1991, US West dismisses the claims of petitioners that the rates in Transmittal 148 involve strategic pricing, arguing that strategic pricing guidelines do not apply to price cap filings, and if they did apply, the rate revisions stay within the relevant crossover ratios. US West Reply at 7-8. According to US West, MCI's petition merely repeats MCI's objections to the pricing flexibility under price cap regulation. *Id.* at 3-4. US West says that the Common Carrier Bureau rejected a similar MCI argument in NYNEX Telephone Companies, Revisions to Tariff F.C.C. No. 1, Transmittal No. 10, released March 14, 1991. *Id.*

6. US West also asserts that it adequately supported Transmittal 148 because it relied on data submitted in previous price cap filings. Id. at 4. It claims that WTG is mistaken in arguing that the Special Access rate adjustments do not fall within band. Id. at 5. According to US West, WTG mistakenly applies the LEC price cap bands to each individual rate element rather than each service category as required by Section 61.47(e) of the Commission Rules, 47 C.F.R. § 61.47(e). *Id.* at 5-6. In addition, US West says that WTG's calculations were faulty because WTG neglected to include nonrecurring revenues. *Id.* at 6. Finally, US West submitted with its reply more detailed support material for its rate adjustments. *Id.* at Attachment.[1]

7. The Common Carrier Bureau has reviewed US West Transmittal 148, the Description and Justification supporting it, and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

8. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate US West Communications Transmittal No. 148 filed by Williams Telecommunications Group, Inc. and the petition to suspend and investigate Transmittal No. 148 filed by MCI Telecommunications Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

FOOTNOTE

[1] On March 21, 1991, US West filed an erratum to its March 20 reply that corrects an error in its attachment showing the aggregation of revenues associated with certain Switched Access rates in Transmittal 148.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 19, 1991

PROCEDURES FOR 1991 ANNUAL ACCESS CHARGE TARIFFS TO BE FILED ON OR BEFORE APRIL 2, 1991

Local exchange carriers (LECs) are required by Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to file new access charge tariffs or revisions to existing tariffs to be effective July 1, 1991 on not less than 90 days' notice. Therefore, the Common Carrier Bureau anticipates receiving these filings on or before April 2, 1991. In this Public Notice, we provide details on the specific procedures to be followed when submitting these filings to the Commission.

GENERAL

Interested parties are reminded that these filings and the associated review and analysis are not part of a docketed proceeding. Therefore, until further notice, all correspondence and pleadings (other than tariff filings) in connection with these filings should not bear any docket number but must instead bear the designation "1991 ANNUAL ACCESS CHARGE TARIFF FILINGS." All such correspondence and pleadings must be submitted with an original and 10 copies. A copy must also be served on the Commission's Commercial Contractor, Downtown Copy Center (DCC), Room 246, 1919 M Street, N.W.

TARIFF FILINGS

LECs submitting tariff filings should consult the attached schedule which details the number of copies required and the location to which those copies should be delivered. Carriers are especially reminded that (1) the tariff filing must be accompanied with the appropriate filing fee of $490, and (2) carriers must serve a copy on DCC. Those annual access filings submitted on April 2, 1991 must be delivered to DCC at the Commission in Room 535, 1919 M Street, N.W.

Carriers, whether filing their own individual tariffs or not, are reminded of the customer notification requirements as outlined in Section 61.58(a)(4) of the Commission's Rules, 47 C.F.R. 61.58(a)(4), concerning rate increases in particular. Carriers are further reminded that the purpose of such notification is to afford any affected customer sufficient opportunity to comment on the tariff filing within the time period established for filing petitions in Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773.

In an effort to facilitate identification and cataloging of the tariff filings, the LECs should:

1. Clearly label any package of revised tariff pages as such, e.g.: BELL ATLANTIC, STATE, TRANS. LTR. #XXX, DATE, REVISED TARIFF PAGES. These revised pages or any completely new tariff should not be submitted in a binder but should be hole-punched for a 3-ring loose leaf binder.

2. Provide a list identifying all cost support volumes submitted with these revisions and associate the list with the cost volumes and the transmittal letter.

3. Clearly label all boxes containing cost support volumes as to their contents, e.g.: BELL ATLANTIC, STATE, TRANS. LTR. #XXX, DATE, VOLS. 1, 2, 3,4, BOX 1 of 5.

4. Submit cost support material in a 3-ring binder pursuant to Public Notice dated December 13, 1986, DA 86-337, and label the volumes of cost support on the spine of the binder with the name of the carrier, the transmittal number, the subject of the filing, the volume number and the date of the filing. For example: BELL ATLANTIC, TRANS. LTR. #XXX, 1991 ACCESS TARIFF FILING, VOL. 2-2 OF 2, APR. 2, 1991.

5. Each carrier should submit its respective Tariff Review Plan and Certification in a separately bound package as required by Commission Requirements for Cost Support Material To Be Filed with 1991 Annual Access Tariffs, Order, DA 91-147, released February 6, 1991.

6. In addition to the paper copies, all companies must submit Tariff Review Plan information in four copies on computer "floppy disks". Carriers should follow the rules for submission of data to the Commission on magnetic media contained in the 1989 Tariff Review Plan (TRP). Carriers should also follow the technical documentation from the 1989 TRP, appropriately updated, for all TRP charts except COS-1(P), COS-6(P) and COS-7(P), for which the carriers should use the documentation for ARMIS reports 43-01, 43-03, and 43-04, respectively. For filing charts COS-1(P), COS-6(P) and COS-7(P), on diskettes, carriers should follow the instructions for ARMIS report 43-01, 43-03, and 43-04, respectively. Finally, Charts COS-7(H) and COS-7(P) should be filed on April 15, 1991, in both hard copy and computer "floppy disks" format. As indicated in the Attachment to this Notice, one copy of the "floppy disks" should be filed with Mark Uretsky, Tariff Review Branch in Room 514. One copy should be filed with Barbara Van Hagen, Accounting and Audits Division, 2000 L St. N.W., Room 812, and the third copy should be filed with Peyton Wynns, Industry Analysis Division, 1919 M Street, N.W., Room 538.

PETITIONS AND REPLIES

Petitions concerning these tariffs will be due April 29, 1991 regardless of whether the tariff revisions are submitted on or before April 2, 1991. Replies may be filed only by the publishing carriers and will be due on May 13, 1991. Petitioning parties should reference the general designation as outlined above or the specific tariff and transmittal number, and not a docket number. Petitions should be organized where possible so as to present comments in a modular form, section-by-section, for ease of analysis. An original and 10 copies of any petition or reply must be filed with the Commission and a copy must be served simultaneously upon the publishing carrier or petitioner. Additionally, DCC must be served with a copy in Room 246, 1919 M Street, N.W.

Members of the general public may submit one copy of their comments, without regard to form, by letter to the Secretary. These comments should specify that they concern the 1991 Annual Access Tariff Filings or a specific tariff transmittal.

PUBLIC INFORMATION

Tariffs filed with the Commission, related correspondence, petitions, and replies concerning the 1991 Annual Access Charge Tariff Filings may be examined by the public from 1:30-4:30 p.m., Monday through Friday, in Room 513, 1919 M Street, N.W., Washington, D.C.

Copies of tariffs, petitions, and other related filings may be obtained from the Commission's Commercial Contractor, DCC. Parties should contact Virginia Cannon of DCC at (202) 452-1422.

For further information, contact: Judith A. Nitsche, Tariff Review Branch (202) 632-5550.

FEDERAL COMMUNICATIONS COMMISSION

Attachment

ANNUAL 1991 ACCESS CHARGE TARIFF FILING

OFFICIAL COPIES	TRANS LETTER	REVISED TARIFF PAGES	Tariff Review Plan HARD COPY	Tariff Review Plan DISKETTE	61.38 COST SUPPORT VOL. 1 D&J ONLY	61.38 COST SUPPORT VOL. 1 D&J PLUS REMAINDER OF 61.38 MATERIAL
SECRETARY'S OFFICE - ROOM 222	1	2	-	-	-	-
PUBLIC REFERENCE ROOM--ROOM 513	1	1	-	-	-	-
DCC - ROOM 535 1919 M ST., N.W.	1	1	1	1	-	1
COURTESY COPIES						
JOHN CIMKO ROOM 518	1	-	-	-	1	-
ANN STEVENS ROOM 518	1	-	-	-	1	-
JUDY NITSCHE ROOM 514	1	1	-	-	1	-
MARK URETSKY ROOM 514	1	-	2	1	-	2
PEYTON WYNNS ROOM 538	-	-	-	1	-	-
Barbara Van Hagen ACCTG & AUDITS DIVISION 2000 L ST., N.W. ROOM 812	1	1	1	1	-	1

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-65

In the Matter of

Policies and Rules Concerning
Interstate 900 Telecommunications
Services

NOTICE OF PROPOSED RULEMAKING

Adopted: March 14, 1991; Released: March 25, 1991

Comment Date: April 24, 1991
Reply Comment Date: May 24, 1991

By the Commission:

I. INTRODUCTION

1. We initiate this rulemaking proceeding to propose rules governing the provision of interstate 900 "pay-per-call" telephone services. This proceeding is prompted by concerns that current industry structure and practices often do not permit consumers to make informed decisions or to protect themselves adequately against unreasonable practices associated with some 900 services. While recognizing that many 900 service offerings provide valuable services to both consumers and businesses, we believe that unreasonable practices which utilize network capabilities to limit informed consumer choice warrant action on our part.

II. BACKGROUND

2. 900 service generally refers to a telecommunications service which allows the simultaneous calling by a large number of callers to a single "900" prefix telephone number,[1] and where the calling party is charged for the call at a rate different from, and often higher than, that charged for an ordinary long distance call. While 900 service has been in existence for over a decade, it has only been within the last several years that competitive interactive services have been offered.[2]

3. The provision of 900 service typically involves four parties: first, the interexchange carrier (IXC) who provides the tariffed telecommunications transmission service and non-tariffed billing and collection service; second, the information provider (IP) or sponsor who provides an enhanced service as that term is defined in the rules[3] and who supplies the information, product or entertainment source, and sets the price to be charged the caller; third, the local exchange carrier (LEC) who, through an arrangement with the IXC, provides billing and collection services; and fourth, the service bureau who takes service from the IXC on behalf of the information provider.[4]

4. Many 900 services provide valuable assistance and information to residential and business customers on a timely and economical basis. Currently, consumers and businesses can access a growing variety of 900 services which, in terms of quality of service and price, are responsive to the needs of many U.S. consumers. There are a number of different types of 900 service available today, including live, informational, interactive and polling services. The specific applications are quite varied. A caller may use the service to obtain stock quotations, crossword puzzle clues, travel information or sports scores. The service may be used for charitable or political fundraising. A customer may gain access to remote data bases, bulletin board services, service representatives, chat lines, and adult message services. Some computer software companies provide user support for their software products through a 900 number on a charge-per-minute basis. Similarly, law and consulting firms offer legal advice and consultations via 900 numbers on either a charge-per-minute or flat-fee basis. 900 service programs range from call count services where "votes" are tallied depending on which of more than one 900 number is dialed; to mass announcement services which play the same prerecorded program for all callers; to live services; to sophisticated database access programs whereby a caller can selectively access specific information.

III. CONSUMER COMPLAINTS CONCERNING 900 SERVICES

5. As 900 services have evolved over the past few years to include more service features and service providers, this Commission has witnessed a dramatic increase in the number of related consumer complaints. Since January 1988, we have received over 2,000 written complaints and inquiries regarding interstate 900 services. One of the practices frequently complained about has involved allegations of false or deceptive disclosure about rates and products. In these cases, consumers typically complain that they were either not told what the cost of the call would be or, if they were quoted a rate, that the disclosure was either inadequate or they were charged rates different from those quoted. Many complainants describe first time experiences with 900 services where the charges typically ranged between $10 to $50 for a one minute telephone call, far exceeding anything they reasonably expected to pay for the services or merchandise provided. Others have complained that the information provider promised to send specific goods or information, such as job leads or credit card application kits, but failed to deliver as promised.

6. Another category of complaints involves charges for calls the consumer denied having made or where someone -- often children -- made the call from the consumer's telephone without permission. Many consumers have also complained that they were prematurely disconnected from 900 programs but were charged the full amount; or that they had to listen to the program more than once because the information was provided too rapidly or the tape quality was poor. These complainants stated that the inferior technical quality caused them to call back or stay on the line longer with resultant higher bills for the service.

7. Some programs about which consumers have frequently complained relate to awards or sweepstakes. Often, consumers received either a postcard or other mail

solicitation or a telephone solicitation call informing them that they had won or were eligible to win a prize which could be redeemed by calling a 900 number; in some cases the solicitation did not disclose the price of the 900 call. In addition to the complaints filed with this Commission, other Federal and State agencies have received and investigated complaints regarding 900 service practices subject to their jurisdiction. For example, complaints about unfair and deceptive practices by information providers have been investigated by the Federal Trade Commission, who has jurisdiction over such practices. Some of the complaints before us allege such practices. In those instances, we have forwarded the complaints to the appropriate State or Federal agency.

IV. DISCUSSION

8. The widespread consumer dissatisfaction over the rates and practices of many 900 service providers, as evidenced by numerous complaints filed with this Commission and with other Federal and State agencies, indicates that regulation in this area is warranted. Review of those complaints leads us tentatively to conclude that consumers are not getting adequate information regarding the charges associated with a 900 call. We also believe that industry practices have caused consumer confusion regarding who is providing the service associated with the 900 service charge, and to whom consumers should complain about the charges. We believe that the common carriers involved in the provision of interstate 900 transmission service should take steps to ensure that consumers have access to this information so that they can make informed decisions related to these calls. Accordingly, we tentatively propose that IXCs, as part of their interstate 900 transmission service offerings, require that price and product or service identification information be given before a consumer incurs a charge for a 900 call. We also tentatively conclude that LECs, at no charge to consumers, must offer the option of blocking all 900 calls from a subscriber's telephones, where technically feasible. Finally, we conclude that a subscriber's basic telephone service should not be disconnected for failure to pay interstate 900 service charges.

A. Regulation of Basic Transmission Services

9. The Communications Act mandates that all practices for and in connection with interstate and foreign communications services shall be just and reasonable. 47 C.F.R. § 201. A fundamental component of all interstate 900 service is the basic transmission and related service provided by the interexchange carrier. Pursuant to the Act's mandate that all practices in connection with communication services be reasonable, we tentatively conclude that an interexchange carrier's offering of 900 transmission service must include the terms and conditions set forth below. We tentatively find it to be an unreasonable practice in violation of Section 201 for interexchange carriers to offer 900 transmission service by tariff or contract without requiring that callers be given information regarding the charges and nature of the calls associated with the carriers' 900 transmission service offerings and the opportunity to act based on that information; and providing the identity of the information provider.

1. Introductory Disclosure Message or Preamble

10. Many of the complaints before us assert that the caller had insufficient or incorrect information regarding the cost or nature of the call. We conclude that callers should have information sufficient to make an informed decision about whether to incur a charge for a 900 service call.[5] We believe that information should be provided to the caller in the form of a disclosure message or preamble at the beginning of the call which effectively notifies callers of the cost of the call and provides an accurate description of what the caller will receive. Further, once having received that information, the caller should have the opportunity to hang up without incurring a charge. This ensures that consumers know what charges they will incur and also allows the caller to disconnect without charge for incorrectly dialed numbers, or if they change their minds. Proposed rule Section 64.711 would require common carriers to include as a term and condition of taking 900 transmission service that the information provider's programs begin with such an introductory disclosure message. The rule would also require common carriers to prohibit any billing of charges to a caller until after the preamble has ended and the caller has had the opportunity to hang-up without incurring any charges. We would expect the preamble to contain clear and concise language and be of reasonable quality and duration. We seek comment on the best way to effectuate this expectation and how to enforce this requirement.

11. We recognize that the 900 services industry offers a wide variety of programs, some of which attract repeat callers. We seek comment therefore on whether repeat callers should be allowed to bypass the preamble and under what conditions. For example, when the charge for the call has increased since the caller's last use, should bypass not be allowed. We also invite comment on whether preambles should be required of all service offerings or whether some exceptions should be made, for example, in the case of polling services, when information is provided in a non-verbal format, or when the charge to the caller is nominal.

12. A number of complaints were filed by parents alleging that their children made the call either without permission or without knowledge of an associated charge. In light of the special concerns regarding 900 offerings aimed at or likely to be of interest to children,[6] we propose that the preamble for such offerings also include a statement that children must obtain the permission of a parent before placing the call and that if they do not have their parents' permission they must hang up.

13. We are aware that a preamble requirement could result in an increase in the cost to the IP of providing service. For example, billing time would not begin until after the end of the preamble. Additionally, the preamble might result in callers, who might otherwise have stayed on the line and incurred a charge, disconnecting during the disclosure message. On the other hand, the preamble would also probably result in less uncollectible bills for calls and in less customer relations problems. We seek comment on the costs and benefit associated with the use of a preamble, whether there should be exceptions to this requirement and any technical problems that might result from such a requirement.

14. The purpose of the preamble is to provide callers with both the information necessary to make an informed decision and the time necessary to act on that information. While we have not proposed to mandate specific

language, we seek comment on whether that is necessary and whether a statement such as the following would provide sufficient information: "Thank you for calling the Sports Line for sports scores. A 50 cent per minute charge will appear on your local phone bill beginning after the tone." We seek comment on these and other related issues.

2. Identity of Information Provider

15. Proposed Section 64.712 would require each interexchange carrier offering basic 900 transmission service to provide, upon verbal or written request, the name, address and customer service telephone number of the information provider (and any other entity to whom the caller might be responsible for paying the 900 service charge). In many cases, the IXC's customer of record is a service bureau which obtains 900 transmission and billing and collection service from IXCs and then markets that capacity to information providers. In such cases, the IXC's customer of record -- the service bureau -- is frequently not the entity with legal responsibility for the program or the ultimate power to adjust the customer's bill. We believe that the provision of the name of the IXC's customer alone, which may only be a service bureau and not the information provider, fails to give the caller an opportunity to confront and seek redress from the entity which is responsible for imposing the charges. This proposed rule would require that the interexchange carrier ascertain who the actual provider of the 900 services program is and provide that information to a customer upon request. We seek comments on the feasibility of this proposal in terms of costs and burdens and whether some less burdensome requirement would be more appropriate.

3. Other Practices

16. There have been complaints that callers to some 900 services were disconnected before the services were completed or that the audio volume was so low or the instructions given so rapidly that callers had to listen to the 900 services message several times to understand the instructions. Similar complaints allege that the call answering equipment refused to accept properly keyed-in responses. The common result in all these instances is that the caller is kept on the line longer or is forced to call back. In either event, both the charges to the caller and the information provider's revenue are increased by poor quality. The Commission requests comments on the extent to which such practices occur and whether we should require specific terms and conditions directed at such problems.

17. We have also received complaints which appear to involve other unreasonable practices that prevent informed choice. For example, there have been complaints regarding automated collect calls. The calls are often generated by an automatic dialer and after answering and listening to a portion of the message, the called party is told to push a number on a touchtone keypad to receive more information. In a similar scenario, the called party may not even be required to push a number but merely to remain on the line. In both cases the called party allegedly was subsequently charged for a 900 service call, and in at least one case, without any notice that a charge would be incurred. Similarly, we have received information about tone generating devices whereby the audio portion of a childrens television program generates the tones necessary to complete a call to a 900 service program. We seek comment on how widespread these practices are, how they are accomplished technically, and whether it would be in the public interest to restrict or prohibit such practices in interstate communications.

18. Another area of complaints dealing with automatic dialers concerns the phenomenon of "line seizing." Whether or not these calls are soliciting 900 callbacks, some consumers have informed us that calls from automatic dialers sometimes remain on the line long after the consumer has attempted to disconnect the call. Several manufacturers of autodialing equipment have denied line seizing is a matter of concern, claiming that newer equipment disconnects immediately upon receiving a disconnect signal from the called party. Even with older equipment, both telephone companies and equipment manufacturers allege seizing ends within 10 to no more than 25 seconds. Moreover, we understand some states require that autodialers operating within these states disconnect within 30 seconds, suggesting that equipment manufacturers intending to appeal to a national market must meet those requirements. We ask parties to comment on whether, and the extent to which, line seizing is a problem both with regard to 900 services and generally. Parties should discuss the influence of both autodialing and telephone network equipment on any problem of line seizure. We seek comment on the costs and benefits of the Commission mandating disconnect and what the period of time should be. We invite parties to call out attention to specific cases of line seizing so we might determine the facts involved.

B. Regulation of Blocking

19. We propose and seek comment on a requirement that LECs, as part of their interstate access service, offer free blocking of interstate 900 services, where technically feasible, to all subscribers who request it. Many of the complaints allege that persons without the subscriber's permission made calls to 900 numbers. We believe that subscribers should have the opportunity to block all such calls from their telephones. We seek comment on whether we should specifically require that blocking be made available upon request and at no cost under three circumstances. First, to all subscribers for an initial period of time when the blocking service is first made available. Second, to all new subscribers when they first obtain service. Third, to all subscribers who dispute or question a 900 service charge for the first time. For subscribers other than those who fall within the three categories enumerated above, we tentatively conclude that LECs should be able to impose reasonable one-time charges for interstate 900 blocking service. We also propose that LECs not be permitted to impose a monthly service fee for interstate 900 blocking for any customer. We note that many LECs already offer blocking at no charge.[7] We invite comment also on whether this free blocking requirement should be restricted to residential customers or extended to business customers. We seek comment on the technical problems and costs which this proposal would impose on affected parties. We also seek comment on how the costs of providing blocking service should be recovered.

C. Disconnection Restrictions

20. We believe that a telephone subscriber's failure to pay an interstate 900 service charge should not threaten his or her ability to have basic telephone service. The Commission has held that it has statutory authority to

regulate disconnection of a subscriber's telephone service for nonpayment of charges, and to preempt state regulation of the terms and conditions under which disconnection will be allowed.[8] The Commission has deferred to the states, however, allowing them to decide whether and under what conditions LECs will be able to disconnect service on behalf of IXCs.[9] With regard to the payment of interstate 900 service charges, we tentatively conclude that we should impose a uniform national policy prohibiting cut-offs of basic exchange and interexchange service for failure to pay interstate 900 service charges.[10] 900 service charges often include charges for service other than basic communications service. We believe that access to basic telecommunications services should not be jeopardized by non-payment of charges that are unrelated to transmission services. Proposed Section 64.714 would require that IXCs or LECs not disconnect a subscriber's basic telephone service for failure to pay interstate 900 services charges. We seek comment on this requirement.

D. Scope

21. The requirements proposed here are intended to apply to interstate 900 Services. We seek comment on whether they should also apply to interstate 700, 976, 540 and other similar services.[11] We note that 800 services historically have been offered toll free to the caller. This may not always be the case, however. We seek comment, therefore, on whether the proposed requirements should also apply to 800 services in those instances where the call is not free to the caller. As proposed, the requirements apply to the provision of all 900 services. We request comment on whether the proposed rules should apply if the 900 call is offered free to the consumer. Finally, we seek comment on what industry practices are regarding consumer dispute resolutions and whether such practices are adequate or effective in resolving consumer disputes.

V. PAPERWORK REDUCTION ACT

22. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found not to impose new or modified information collection requirements on the public.

VI. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

23. **Reason for action**. The Commission is issuing this Notice of Proposed Rulemaking to protect consumers from unreasonable practices related to interstate 900 service and to ensure consumers have the opportunity to make informed choices in placing interstate 900 services calls.

24. **Objectives**. The objective of this Notice of Proposed Rulemaking is to initiate a proceeding to prescribe regulations that protect consumers from unfair and unreasonable practices related to their use of interstate 900 services and that ensure that consumers have the opportunity to make informed choices in making such calls.

25. **Legal basis**. Sections 1, 4(i), 4(j), 201-205, 218, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218, 303(r).

26. **Description, potential impact, and number of small entities affected**. The proposed rules will require that entities in the 900 services industry provide information that is necessary for consumers to make knowledgeable choices among services. The rules will also help to eliminate certain practices and charges that impair a consumer's ability to make informed choices. Small entities may feel some economic impact due to the proposed requirements.

27. **Reporting, recordkeeping, and other compliance requirements**. The proposed rules require reporting in the form of the disclosure by 900 service providers to interexchange carriers of certain information regarding their identities and their services.

28. **Federal rules which overlap, duplicate, or conflict with the Commission's proposal**. None.

29. **Any significant alternatives minimizing impact on small entities and consistent with stated objectives**. We shall consider any alternatives suggested in comments that are consistent with the public interest obligations imposed by the Communications Act.

30. **Comments are solicited**. We request written comments on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. § 601, *et seq*.

VII. EX PARTE REQUIREMENTS

31. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. See generally Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f) of the Commission's Rules, 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203.

32. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decisionmaking personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advanced notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b) of the Commission's Rules, 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number

of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labelled or captioned as an *ex parte* presentation.

33. Any person who is making an oral *ex parte* presentation presents data or arguments not already reflected in the person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary, with a copy to the Commissioner or staff member involved, which summarizes the data and arguments. The memorandum, as well as any transmittal letter, must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206.

34. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

VIII. CONCLUSION AND ORDERING CLAUSES

35. The rules proposed in this NPRM are intended to protect consumers from unfair and unreasonable practices related to their use of interstate 900 services and to ensure that consumers have the opportunity to make informed choices in placing such calls. We expect the proposed rules to help free consumers from charges they did not agree to and from unreasonable practices utilizing network capabilities to limit informed consumer choice. These rules will also help foster a marketplace environment in which 900 service providers compete based on the merits of their services rather than capitalizing on consumer confusion and lack of knowledge. In submitting comments on these proposed rules, interested parties should note that we are particularly interested in evidence regarding the technical and operational complexities of implementing the proposed rules. We are also interested in the economic impact of implementation in terms of costs to or burdens on consumers, interexchange carriers, LECs, service bureaus and information providers.

36. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 218, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218, 303(r), that a NOTICE OF PROPOSED RULEMAKING IS ISSUED, proposing the amendment of 47 C.F.R. Parts 64 as set forth in Appendix B.

37. IT IS FURTHER ORDERED, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, that all interested parties may file comments on the matters discussed in this NPRM and on the proposed rules contained in Appendix B by **April 24, 1991**, and reply comments by **May 24, 1991**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

38. IT IS FURTHER ORDERED that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

39. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this NPRM, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 603(a) (1981). The Secretary shall also cause a summary of this NPRM to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX
PROPOSED RULES

It is proposed that Part 64 of Title 47 of the Code of Federal Regulations be amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, unless otherwise noted.

2. New sections 64.710 through 64.714 are added to read as follows:

§ 64.710 Limitations on the Provision of Pay-Per-Call Services

Common carriers may provide interstate 900 transmission service only under the terms and conditions required by §§ 64.711 through 64.714.

§ 64.711 Preamble

(a) Programs must begin with a disclosure message that clearly states the cost of the call. The preamble must disclose all per call charges. If the call is billed on a usage sensitive basis, the preamble must state all rates, by minute or other unit of time, any minimum charges and the average cost for calls to that program unless the average length of the program cannot be determined, as in the case where the caller is in sole control of the length of program

because of his ability to select portions of the program by entering responses on a touchtone keypad or other device;

(b) The preamble must accurately describe the information, product or service which the caller will receive for the fee;

(c) The preamble must inform the caller that billing will commence only after a specific, identified event following the disclosure message such as a signal tone;

(d) The preamble associated with interstate 900 offerings aimed at or likely to be of interest to children under the age of eighteen must contain a statement that the caller should hang up unless he or she has parental permission; and

(e) A caller may be provided the means to bypass the preamble on subsequent calls, unless the charge for those calls has increased since the caller's last use, provided that the caller is in sole control of that capability.

§ 64.712 Identification of Information Providers

The carrier providing interstate 900 transmission service shall provide the name, address and customer service telephone number of any information provider to whom it provides 900 service, either directly or through another entity such as a service bureau, as well as that information for any other entity to whom the caller might be responsible for paying the 900 service charge. The carrier shall provide that information upon verbal or written request.

§ 64.713 Blocking of 900 Service

Local exchange carriers must offer to their subscribers, where technically feasible, an option to block all interstate 900 services. Blocking is to be offered at no charge on a one-time basis to all telephone subscribers.

§ 64.714 No Disconnection for Failure to Pay 900 Service Charges

No common carrier shall disconnect, or order the disconnection of, a telephone subscriber's basic communications service as a result of that subscriber's failure to pay interstate 900 service charges.

FOOTNOTES

[1] We use the term 900 service to refer generally to the pay-per-call service a caller accesses when he or she dials a 900 prefix telephone number. 900 numbers are ten digit numbers usually providing nationwide access. The term 900 service is also used by the interexchange carriers in their tariffs to refer to their underlying basic transmission service offering. For example, AT&T describes its Dial-It 900 Service as "a telecommunication service which permits simultaneous calling by a large number of Callers to a single telephone number utilizing the telecommunications network." AT&T Tariff F.C.C. No. 1, Page 136. MCI Telecommunications Corporation describes its 900 Service as "an inbound, long distance, voice-grade telecommunications service that permits callers to place long distance calls to Customer's station in one location from stations in diverse geographical service areas." MCI Tariff F.C.C. No. 1, Page No. 19.14. When referring to the latter service provided by the interexchange carrier, we will use the term 900 tansmission service.

[2] For a discussion of some early applications of 900 service, *see* Reports, Carriers and Code Assignments for 800 Service, 900 Service and Carrier Identification Codes, Industry Analysis Division, Federal Communications Commission, October 31, 1990. For a discussion of the past regulatory treatment of AT&T 900 Dial-It Services see AT&T 900 Dial-It Services and Third Party Billing and Collection Services, 4 FCC Rcd 3429 (Comm. Car. Bur. 1989) (AT&T 900 Order).

[3] 47 C.F.R. § 64.702(a). The Commission first considered the proper regulatory treatment of mass calling services, including 900 services, in the Second Computer Inquiry (Computer II). *See* In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II) 77 FCC 2d 384 (1980), recon., 84 FCC 2d 50 (1981), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). It distinguished basic transmission capacity for the movement of information between two points (basic service), from enhanced services which utilize underlying basic service for the provision of various information services, including information storage and retrieval services. Computer II Reconsideration, 84 FCC 2d 50, 53-55. In the Computer II proceeding, the Commission concluded that the provision of enhanced services should not be subject to rate and service provisions of Title II of the Act.

[4] The service bureau may be affiliated with the IXC. Often the service bureau supplies the equipment to the IP, and by aggregating the traffic of many IPs, offers service to the IP at a rate less than the IP could get directly from the IXC.

[5] A number of consumers have complained about allegedly fraudulent practices by information providers. We recognize that our actions here will not prevent unscrupulous parties from engaging in fraudulent activities, such as failing to deliver promised goods or services. We will continue to refer those cases to the relevant regulatory bodies, both State and Federal, for appropriate action.

[6] We propose to define children's 900 offerings as those services aimed at or likely to be of interest to children under the age of eighteen. We seek comment on whether another age would be more appropriate and also on what criteria should be used to determine what constitutes 900 offerings aimed at or likely to be of interest to children.

[7] Blocking of 900 services is either planned or currently available in all states served by US West, Bell Atlantic, BellSouth and Ameritech. Also Pacific Bell has made it available in California. It is not free in all these areas, may not be available in all areas served by these companies and may not be available from independent LECs.

[8] *See* Public Service Commission of Maryland, 4 FCC Rcd 4000, 4006 (1989), *aff'd*, 909 F.2d 15120 (1990)

[9] *See* Matter of Detariffing of Billing and Collection Services, 102 FCC 2d 1150 (1986)

[10] The Common Carrier Bureau previously dealt with this question in 1989 in its AT&T 900 Order, and ordered AT&T to take adequate steps to ensure that communications services to callers are not disconnected for failure to pay charges associated with one of its 900 services. AT&T 900 Order 4 FCC Rcd at 3433.

[11] Interstate (ten digit) pay-per-call numnbers may include 700 prefixes. Local (seven digit) pay-per-call numbers include 976 or 540 prefixes.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-336

In the Matter of

Amendment of Section 22.521(b)
of the Commission's Rules
to include Columbia, Missouri;
Fort Myers, Florida; and
Wilmington, North Carolina,
in the table of assignments
for air-ground stations in
the Public Mobile Service

REPORT AND ORDER

Adopted: March 20, 1991; Released: April 4, 1991

By the Commission:

1. On July 9, 1990, the Commission adopted a Notice of Proposed Rule Making (NPRM) in the above-referenced Docket in response to two petitions filed by COM/NAV Marine (Comnav) and Qualicom Message Center (Qualicom). 5 FCC Rcd 4599 (1990). In that NPRM, the Commission proposed to amend 47 C.F.R. Section 22.521(b) to assign air-ground channel 5, frequency 454.750 MHz, to Columbia, Missouri; air-ground channel 6, frequency 454.700 MHz, to Wilmington, North Carolina; and air-ground channel 10, frequency 454.875 MHz, to Fort Myers, Florida.

2. Air-ground radiotelephone service is a public radio service between base stations and airborne mobile stations. In creating the air-ground service, the Commission adopted the goal of encouraging the provision of nationwide service utilizing the minimum amount of spectrum necessary. The Commission recognized that its allocation of 12 air-ground channels would permit nationwide service if the channels were used in sufficiently separate geographic areas. *Air-Ground Service*, 22 FCC 2d 716 (1969).

3. Only two comments were filed in response to the NPRM. In its comments, related only to the Fort Myers allocation, Qualicom reiterates the need for air-ground service in that area. Mobile Telecommunications Technologies, Inc. (Mtel), successor to Comnav, stresses the need for air-ground service in the Wilmington and Columbia areas, stating that these locations are 114 and 109 miles, respectively, from the nearest authorized air-ground facilities. Mtel states that this distance deprives both areas from quality air-ground service. Mtel further states that all three cities are principal centers of commerce that are currently without air-ground service.

4. We find that the record in this proceeding supports the need for quality air-ground communications in Fort Myers, Florida; Wilmington, North Carolina, and Columbia, Missouri.

5. In view of the foregoing, IT IS ORDERED that 47 C.F.R. Section 22.521(b) is amended to assign working channel 5 to Columbia, Missouri; working channel 6 to Wilmington, North Carolina; and working channel 10 to Fort Myers, Florida, as set forth in the Appendix below. The effective date of this order will be 30 days after its date of publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1083, as amended; 47 U.S.C. 154, 303.

2. Section 22.521 is amended by adding locations and channels in paragraph (b) for Fort Myers, FL; Columbia, MO; and Wilmington, NC to read as follows:

22.521 Air-ground radiotelephone service.

* * * * *

(b) * * *

Location	Channel

* * * * *

Florida:	
Cocoa	3, 11
Fort Myers	10

* * * * *

Missouri:	
Columbia	5
Kansas City	2, 8

* * * * *

North Carolina:	
Charlotte	2
Rocky Mount	11
Wilmington	6

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-192

In re Applications of

THOMAS W. LAWHORNE File No. BPH-880505OA
Sylvester, Georgia

CAM-BROADCASTING, INC. File No. BPH-8805050J
Sylvester, Georgia

For Construction Permit for
a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: March 21, 1991; Released: April 5, 1991

By the Review Board: MARINO (Chairman), and BLUMENTHAL.

Board Member ESBENSEN absent.

1. The Review Board has before it: (a) an appeal filed by CAM-Broadcasting, Inc., (CAM) on January 31, 1991, pursuant to 47 CFR § 1.301(a)(1), from the *Memorandum Opinion and Order*, FCC 91M-267, released January 24, 1991, of Administrative Law Judge Edward J. Kuhlmann (ALJ), dismissing CAM's application and granting the competing application of Thomas W. Lawhorne (Lawhorne); (b) Lawhorne's opposition to CAM's appeal, filed on February 7, 1991; (c) CAM's February 12, 1991 request for oral argument and Lawhorne's February 13, 1991 opposition thereto; and (d) CAM's February 21, 1991 Petition For Leave To Amend, filed pursuant to Section 1.65 of the Commission's Rules.[1] Because the written pleadings more than adequately address the issues, we will deny CAM's appeal without the need for oral argument.

BACKGROUND

2. The *Hearing Designation Order*, 5 FCC Rcd 1095 (1990), originally specified only the "standard comparative" issue. On June 25, 1990, Lawhorne filed a Motion to Enlarge seeking site availability and abuse of process issues against CAM.[2] As to CAM's site, Lawhorne alleged that while CAM certified in its application that one Thomas Bozeman owned the property upon which CAM's transmitter would be located, in fact the coordinates of CAM's proposed transmitter site (as specified in CAM's application) did not match the actual land which CAM apparently intended to use.

3. In an Opposition filed on July 12, 1990, CAM submitted that, because of an "inadvertent error," the wrong coordinates were listed in its application. However, CAM stated that it always intended (and yet intends) to use Bozeman's land. In support, CAM submitted the affidavit of Bozeman, who is president of a real estate firm, stating that he was indeed contacted by a CAM principal in 1988 and that he agreed in a May 3, 1988 letter to sell five acres of his land to CAM for its use as a transmitter site. Bozeman further stated that, although the coordinates in his letter to CAM were apparently incorrect, the narrative description of the site in CAM's application was correct. CAM added that a "corrective" technical amendment would be filed promptly.

4. At a July 30, 1990 prehearing conference, the ALJ established a procedural schedule, memorialized in his *Order*, FCC 90M-2313, released August 1, 1990. January 8, 1991 was set as the date for the exchange of the applicants' written cases, well in advance of the January 22, 1991 hearing. In a subsequent *Memorandum Opinion and Order*, FCC 90M-2335, released August 2, 1990, the ALJ granted Lawhorn's Motion to Enlarge, and added the following issues against CAM[3]:

> To determine whether or not CAM Broadcasting, Inc. has reasonable assurance that its specified antenna site will be available to it;
>
> To determine whether, in light of the evidence adduced pursuant to the foregoing issues, whether or not CAM Broadcasting, Inc. is basically qualified to be a Commission licensee.

5. On October 25, 1990, and three months after its promised "corrective" amendment, CAM filed a Petition for Leave to Amend its application, pursuant to 47 CFR Section 73.3522(b)(1). The proffered amendment revised the transmitter site coordinates to 31^0 35' 23" N. Latitude, 83^0 49' 30" W. Longitude, and it also increased CAM's effective radiated power from three kilowatts to six kilowatts. Further, in an October 25, 1990 Declaration, the landowner Bozeman stated that this entire problem was caused when he erroneously "pinpointed the location of my land on the . . . map that was provided by CAM . . . approximately one mile north of where it really is." The ALJ accepted the CAM amendment, noting that it had disclaimed any upgrading of its comparative position in the proceeding. *Memorandum Opinion and Order*, FCC 90M-3717, released November 26, 1990.

6. On November 28, 1990, CAM filed a Motion for Summary Decision on the site availability issue, urging that its corrective amendment had been accepted by the ALJ, and therefore that there remained no further question that Bozeman would make that site available to CAM. On December 12, 1990, Lawhorne opposed CAM's motion, contending that the added issue "relates not merely to the placement of inaccurate coordinates, but to the facts and circumstances surrounding the placement of the coordinates and the availability of the CAM tower site." More to the point, Lawhorne asserted that Bozeman failed to explain in his October 25, 1990 Declaration exactly why he made the mistake of pointing to the wrong spot on the map. Therein, Bozeman had stated:

> When I pointed the location of my land on the attached map that was provided by CAM, I made an error and located the fire tower and the proposed FM tower site approximately one mile north of

> where it really is. The outline of two of the roads north of Sylvester are so similar that I was confused when I marked the location of my land.

Lawhorne's opposition contended, however, that Bozeman's explanation "is vague and confusing -- even inconsistent."

7. However, on December 13, 1990, Lawhorne filed its "Further Comments and Withdrawal of Thomas W. Lawhorne's Opposition to Motion for Summary Decision." Lawhorne now stated that he deposed Bozeman on December 12, 1990, and that:

> The deficiencies in his declaration . . . were not all resolved. However, Lawhorne believes that further inquiry into the site availability issue could be fruitless. It *does* appear that CAM has reasonable availability of the Bozeman site, notwithstanding the fact that the reasons for CAM's original error in specifying the coordinates remain unclear.

8. On January 8, 1991, CAM exchanged its direct case exhibits; its Exhibit 4 addressed the still formally outstanding site availability issue in two terse sentences:

> **Site Issue**
>
> The Federal Aviation Administration has notified CAM-Broadcasting, Inc. that our proposed tower site (corrected coordinates) would not be a hazard to air navigation. A copy of the FAA notice is attached hereto as Appendix A.

On January 9, 1991, by *Order*, FCC 91M-77, the ALJ denied CAM's Motion for Summary Decision "[f]or the reasons given by Lawhorne in its opposition." On January 14, 1991, Lawhorne, thus reinvigorated, requested that CAM produce Bozeman for cross-examination at the hearing. Although CAM objected to producing Bozeman, the ALJ expressly ordered CAM to do so. *Memorandum Opinion and Order*, FCC 91M-229, released January 21, 1991. The hearing on January 22, 1991 lasted only two minutes: after there learning that CAM had, in effect, failed to exchange *any* probative written evidence on the designated site availability issue, and upon denying CAM's request to develop any such evidence orally, the ALJ summarily dismissed CAM's application and terminated the proceeding. Those rulings were confirmed in a written order which concurrently granted Lawhorne's application. *Memorandum Opinion and Order*, FCC 91M-267, released January 24, 1991.

APPEAL

9. CAM's appeal advances three arguments.[4] First, CAM maintains that contrary to the ALJ's conclusion it did exchange written evidence on the site availability issue, namely its "Exhibit 4," and that it intended to "supplement" the record with oral testimony at the hearing. Second, CAM contends that the dismissal of its application was in any event an unduly harsh sanction, especially in view of Lawhorne's own withdrawal of opposition to the grant of summary decision. And, third, CAM faults as "injudicious" the following footnote in the ALJ's final *Memorandum Opinion and Order*:

> CAM suggested at the hearing session that it acted as it did because Lawhorne no longer wanted to pursue the issue and, therefore it no longer had an obligation to submit evidence. It is the public interest that is the guide to how an issue will be considered in Commission proceedings, not the private interests of the parties. Earlier in the proceeding, it had been alleged, CAM withheld information from the Commission about Lawhorne's qualifications in order to force him to settle. Whatever the merits of that allegation, it was then explained that the private interests of the parties could not and would not dictate the issues in this proceeding.

DISCUSSION

10. We have reviewed the facts and circumstances underlying the dismissal of CAM's application. As we see it, the operative dispute between CAM and the ALJ may distill down to form rather than substance. Although it may be that the actions of CAM were not of the egregious and prejudicial character surveyed by the court in *Communi-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988), CAM's utter failure to present a written case on the outstanding site availability issue would appear to have given the ALJ little legal alternative but to find CAM unqualified on the merits of the designated site issue. We fully recognize that Lawhorne had previously withdrawn its own private opposition to CAM's request for summary decision on that very same issue. But, after considering all of the pleadings, the ALJ himself was not persuaded that no substantial and material questions of fact remained unanswered, and he denied summary decision on the site issue, a matter quite within the ALJ's routine discretion. *See* 47 CFR § 1.251. Similarly within the ALJ's routine discretion was his pre-hearing order here for the parties to present their substantive evidence in written exhibits, which exhibits were to be exchanged well *prior to* the actual hearing. *See Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, 782 FCC 2d 182, 197-98 (D.C. Cir. 1985) (ALJs have "broad discretion" to regulate hearing). Consequently, when CAM's written exhibit failed altogether to address the outstanding site availability issue, its request to present instead oral evidence at hearing was in rather direct conflict with the ALJ's governing order to the parties to submit their evidence *in advance* and *in writing*.

11. To expedite its frequently lengthy comparative licensing proceedings, the Commission explicitly authorized its ALJs "to require submission of written evidence . . . [to] avoid unnecessarily prolonging hearings due to taking of oral testimony . . . ." *Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 866 (1976); *see also* 47 CFR Section 1.248(d).[5] In failing to present a meaningful direct written case on its site availability issue, CAM -- through neglect, misunderstanding, or otherwise -- now seems unavoidably in default on a very basic qualifying matter. While the ALJ, perhaps, might better have "denied" CAM's application on the merits of the site issue by announcing a total failure of proof, *see, e.g., Victorson Group, Inc.*, FCC 91R-26, adopted March 15, 1991 at paras. 17-21, we find that any error in his "dismissal" was effectively harmless under these facts. On the strict basis of the record before us, CAM seems, *prima facie*, subject to virtually immediate disqualification on the merits. Out of an abundance of caution, however, the Board will, as a procedural mat-

ter, vacate the "dismissal" of CAM and remand this matter to the ALJ for disposition in a manner consistent with the Board's foregoing discussion.[6] *See Pan American Broadcasting Co.*, 89 FCC 2d 167 (Rev. Bd. 1982).

12. Accordingly, IT IS ORDERED, That CAM-Broadcasting, Inc.'s request for oral argument IS DENIED; its petition for leave to amend IS GRANTED and the amendment is ACCEPTED; and its appeal IS GRANTED to the limited extent indicated herein;

13. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the Administrative Law Judge for action consistent with the Board's decision.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] This amendment reports that CAM principal, Randall Acres, sold his stock in the applicant to his father, Russell Acres, on February 1, 1991. We accept this information. 47 CFR § 1.65.

[2] The abuse of process issue pertained to CAM's alleged threats against Lawhorne in the context of settlement discussions.

[3] The ALJ also added the requested abuse of process issue against CAM.

[4] Initially, as noted by Lawhorne, CAM's appeal is misstated because it was filed pursuant to 47 CFR Section 1.301(a)(1). That section, however, pertains to appealable interlocutory rulings of an ALJ which terminate the right of a party to participate in a hearing. Section 1.302 is the applicable rule here, because the ALJ's January 24 ruling terminated the proceeding rather than, strictly speaking, merely terminating CAM's status as a party in the proceeding.

[5] Indeed, in its recent *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 162 (1990) (footnote omitted), the Commission has gone even further and declared that:

> we will make it clear that ALJs should permit oral testimony and cross examination only where material issues of decisional fact cannot adequately be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings. Witnesses should not be requested for cross-examination unless there is a legitimate expectation that some part of their direct testimony, as reflected in exhibits, is subject to a question of substantial decisional significance.

[6] We detect no "injudicious" action by the ALJ in his January 24 order because of his mention of the pending abuse of process issue against CAM. Suffice it that CAM's speculation that the ALJ dismissed its application for reasons other than stated is without the slightest support.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 22, 1991

Released: April 4, 1991

J. Dominic Monahan, Esquire 8210-AJZ
Dow, Lohnes & Albertson C12-297
1255 - 23rd Street, N.W.
Washington, D.C. 20037

Dear Mr. Monahan:

This is in reference to your request for declaratory ruling, permitting Independence Broadcasting Company, licensee of station KAMG(AM), Victoria, Texas, to enter into a "programming affiliation agreement" with Coastal Wireless, Inc., licensee of station KPLV(FM), Port Lavaca, Texas,[1] in which KAMG would provide programming to KPLV from 6 a.m. to midnight seven days a week. You represent that the stations are separated by approximately 30 miles, and the coverage map you provided shows substantial overlap between KAMG's 5.0 mV/m contour and KPLV's 3.16 mV/m contour.

Under the proposed seven-year agreement, KAMG would provide programming consisting of public affairs programming, public service announcements, music, news, weather reports, sports, promotional material, and advertising during the above-stated hours, except when KPLV has otherwise scheduled "public interest programming." KPLV would retain the right to delete or not broadcast any programming it deems unsuitable for broadcast or otherwise contrary to the public interest, as well as to substitute public interest programming as it deems appropriate. Under the agreement, KPLV would provide KAMG with prior written notice, if possible, or if not, written notice within two days afterward, of any deletions or substitutions in programming. To this end, KPLV's general manager would submit a sworn affidavit to KAMG every month confirming the portion of KAMG's programming actually broadcast on KPLV.

KAMG would reserve the option to simulcast all or part of the programming it provides to KPLV. As well as providing the programming, KAMG would also have the right to sell a majority of the advertising time on either KPLV alone, KAMG alone, or on both KPLV and KAMG. KPLV would retain exclusive control over its operations, including labor relations and personnel matters, specification, acquisition, installation, operation, maintenance, and repair of facilities and equipment, and the technical broadcast of the station's signal. KPLV would also pay all of its own operational expenses and retain the authority to hire, promote, and fire all employees. Either party has the right to terminate the agreement with notice, if the brokered programming fails to serve the needs of KPLV's listening audience or does not otherwise serve the public interest. Upon expiration, the agreement is automatically renewed unless terminated or the parties provide notice of an intent not to renew. The agreement would also become binding upon any assignee or transferee of KPLV.

The proposed agreements appear to comply with the Commission's time brokerage policy, as explained in *Roy R. Russo*, 5 FCC Rcd 7586 (M.Med.Bur. 1990), and *Joseph A. Belisle*, 5 FCC Rcd 7585 (M.Med.Bur. 1990)(*citing Part-Time Programming*, 82 FCC 2d 107 (1980) and *Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208 (1989)). In *Russo* and *Belisle*, we permitted stations in the same market, or those with overlapping contours, to broker time on each others' stations, because there was no indication that the brokering station had or would obtain an undue amount of control over the brokered station or that, conversely, the brokered station had or would abdicate ultimate control in the areas of finances, personnel matters, and programming. *Russo*, *supra*, at 7587, *Belisle*, *supra*. *See also Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981). Additionally, in removing time brokerage agreements from the purview of the cross-interest policy, the Commission neither set limits on the amount of time a brokered station could sell, nor on the amount of contour overlap between two stations entering into such agreements. With respect to the joint sale of advertising on both stations, the Commission eliminated its prohibition on joint sales practices in the 1986 "underbrush" proceeding. *Elimination of Unnecessary Broadcast Regulation*, 59 RR 2d 1500, 1515 (1986).

Here, there is no indication that control over KPLV's operations would be an issue in the implementation of these agreements. Because the agreement does not address certain licensee obligations, however, we remind KPLV that it must continue to air its own station identifications, maintain its own main studio within its principal community contour, and maintain its own public inspection file, including the obligation to cover local community issues, as reflected in the public inspection file's issues/programs lists. We will also reiterate the Commission's statement in *Reexamination of the Commission's Cross-Interest Policy*, *supra*, at 2214, that while we may approve a time brokerage agreement, the Justice Department may determine that the enforcement of antitrust laws is necessary to remedy an anticompetitive arrangement that may occur as a result of the implementation of a time brokerage agreement. Additionally, a station that airs brokered programming for most of its broadcast day, as proposed in this "programming affiliation agreement," must remain responsive to the needs of its community of license, or risk losing its license through the denial of a renewal expectancy. *See Harriscope of Chicago, Inc.*, 5 FCC Rcd 6383, 6385 (1990)(licensee that eliminated nonentertainment and local programming by switching to STV operation not entitled to renewal expectancy). *See also Broadcast Communications, Inc.*, 93 FCC 2d 1162, 1169 (Rev. Bd. 1983), *aff'd in relevant part*, 97 FCC 2d 61 (1984), *aff'd sub nom. Genesis Broadcasting Ltd. v. FCC*, 759 F.2d 969 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 946 (1985)(brokered station was entitled to strong preference for past programming, because it exercised adequate control over brokers and required inclusion of public service announcements and newscasts).

This caution applies with equal force to the licensee's compliance with the political programming laws. The licensee must oversee, and take ultimate responsibility for, the broker's advertising and programming practices with

respect to the provision of equal opportunities, lowest unit charge and reasonable access to political candidates (47 U.S.C. §§ 315 and 312(a)(7)), and compliance with the political rules embodied in Section 73.1920, 73.1930, and 73.1940 of the Commission's Rules. *See Part-Time Programming*, 82 FCC 2d at 117.

Accordingly, your request for declaratory ruling IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

FOOTNOTE

[1] According to 1990 U.S. Census Bureau statistics, Victoria has a population of 55,076; Port Lavaca has a population of 10,886. In addition to KAMG(AM), there is one AM station, three commercial FM stations, and one noncommercial FM station licensed to Victoria. In addition to KPLV(FM), there is one AM station licensed to Port Lavaca.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 22, 1991

Released: April 4, 1991

Peter D. O'Connell, Esquire 8210-AJZ
Reed Smith Shaw & McClay C11-596
1200 - 18th St., N.W. C12-98
Washington, D.C. 20036

Dear Mr. O'Connell:

This is in reference to your request for declaratory ruling, permitting Citadel Associates Limited Partnership, licensee of station KKFM(FM), Colorado Springs, Colorado, and Whale Communications of Colorado, Inc., licensee of KKMG(FM), Pueblo, Colorado,[1] to enter into a time brokerage agreement ("Agreement I"), whereby KKFM would become the broker for the sale of advertising time on KKMG. The coverage maps you provided show a 100% overlap of the stations' city grade signals. The stations also propose to enter into a program brokerage agreement ("Agreement II"), as a future substitute, which would allow KKFM to provide up to 24 hours of programming per day to KKMG.

Under the terms of Agreement I, KKMG would sell all of its commercial advertising time to KKFM which would, in turn, resell and provide all advertising programming on KKMG, in an amount equal to that now aired on KKFM. The two-year agreement proposes a renewable year-to-year option. KKMG's employees would remain responsible to certify that all logged advertising was run at the appropriate times. KKMG would maintain complete control over programming, including the exercise of its absolute discretion to preempt programming or reject any advertisements, airing station identifications, maintaining a main studio within the principal community contour, and covering local issues for the quarterly issues/programs lists. Although KKMG would maintain the public inspection file, KKFM would provide KKMG with all necessary information related to political advertisements and sponsored programming addressing controversial issues of public importance. To this end, KKFM would consult with KKMG as to the proper adherence to all political broadcast laws. KKMG's general manager would oversee the day-to-day operations of the station, and the station would be responsible for all personnel used in the management and operation of the station. KKFM would be responsible for all employees involved in the sale of advertising time and production of commercials.

The parties may terminate Agreement I with notice on various dates before the two-year term expires, with the provision of reciprocal payments upon termination after a certain date. KKFM would also have the right of first refusal if KKMG terminates or elects not to renew the agreement and seeks to enter into another time brokerage agreement within six months of termination or non-renewal. Upon the sale of KKMG, KKFM would have the right of first refusal in the event the Commission changes the duopoly rule to permit such sale to KKFM. Any future assignee of KKMG would also be bound by the terms of the agreement.

Agreement II, which is similar in nature to the time brokerage agreement described above, would allow KKFM to provide up to 24 hours of programs daily to KKMG, which would originate from KKFM's studios. The format would consist of "music, entertainment and/or news, promotions and other features." Agreement II would substitute for Agreement I upon mutual consent of the parties. While KKFM would be responsible for the program production personnel, KKMG would be responsible for all personnel used in the transmission of programming. While on the premises, all personnel would report to KKMG's general manager and/or chief engineer. As with the time brokerage agreement, KKMG would maintain ultimate control over programming, including retaining the right to suspend or cancel any program not in compliance with the standards set out in the agreement. In addition, KKMG would retain the absolute right to preempt the broker's programs to broadcast a program deemed to be of greater national, regional, or local interest, or for special events. The parties represent that under Agreement II, KKMG would not be simulcasting the programming of KKFM. Both agreements contain identical term, termination options, right of first refusal provisions upon sale or termination, and successors and assigns clauses.

The proposed agreements appear to comply with the Commission's time brokerage policy, as explained in *Roy R. Russo*, 5 FCC Rcd 7586 (M.Med.Bur. 1990), and *Joseph A. Belisle*, 5 FCC Rcd 7585 (M.Med.Bur. 1990)(*citing Part-Time Programming*, 82 FCC 2d 107 (1980) and *Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208 (1989)). In *Russo* and *Belisle*, we permitted stations in the same market, or those with overlapping contours, to broker time on each others' stations, because there was no indication that the brokering station had or would obtain an undue amount of control over the brokered station or that, conversely, the brokered station had or would abdicate ultimate control in the areas of finances, personnel matters, and programming. *Russo*, *supra*, at 7587, *Belisle*, *supra*. *See also Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981). Additionally, in removing time brokerage agreements from the purview of the cross-interest policy, the Commission neither set limits on the amount of time a brokered station could sell, nor on the amount of contour overlap between two stations entering into such agreements. Here, there is no indication that control over KKMG's operations would be an issue in the implementation of these agreements. We also note with approval KKMG's acknowledgement that it remains solely responsible for airing its own station identifications, maintaining a main studio within the station's prinicipal community contour, maintaining its own public inspection file, and covering local community issues, as reflected in the issues/programs lists.

We will reiterate, however, the Commission's statement in *Reexamination of the Commission's Cross-Interest Policy*, *supra*, at 2214, that while we may approve a time brokerage agreement, the Justice Department may determine that the enforcement of antitrust laws is necessary to remedy an anticompetitive arrangement that may occur as a result of the implementation of a time brokerage agree-

ment. Additionally, a station that airs brokered programming 24 hours per day, as proposed in Agreement II, must remain responsive to the needs of its community of license, or risk losing its license through the denial of a renewal expectancy. *See Harriscope of Chicago, Inc.*, 5 FCC Rcd 6383, 6385 (1990)(licensee that eliminated nonentertainment and local programming by switching to STV operation not entitled to renewal expectancy). *See also Broadcast Communications, Inc.*, 93 FCC 2d 1162, 1169 (Rev. Bd. 1983), *aff'd in relevant part*, 97 FCC 2d 61 (1984), *aff'd sub nom. Genesis Broadcasting Ltd. v. FCC*, 759 F.2d 969 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 946 (1985)(brokered station was entitled to strong preference for past programming, because it exercised adequate control over brokers and required inclusion of public service announcements and newscasts).

This caution applies with equal force to the licensee's compliance with the political programming laws. The licensee must oversee, and take ultimate responsibility for, the broker's advertising and programming practices with respect to the provision of equal opportunities, lowest unit charge and reasonable access to political candidates (47 U.S.C. §§ 315 and 312(a)(7)), and compliance with the political rules embodied in Section 73.1920, 73.1930, and 73.1940 of the Commission's Rules. *See Part-Time Programming*, 82 FCC 2d at 117.

Accordingly, your request for declaratory ruling IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

FOOTNOTE

[1] According to 1990 U.S. Census Bureau statistics, the population of Colorado Springs is 281,140; that of Pueblo is 98,640. In addition to KKFM(FM), there are four commercial FM stations, three noncommercial FM stations, and six AM stations licensed to Colorado Springs. In addition to KKMG(FM), there are five commercial FM stations, four noncommercial FM stations, and six AM stations licensed to Pueblo.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 22, 1991

Released: April 4, 1991

Brian M. Madden, Esquire 8210-AJZ
Cohn and Marks C1-70
1333 New Hampshire Avenue, N.W. C1-362
Suite 600
Washington, D.C. 20036-1573

Dear Mr. Madden:

This is in reference to your request for declaratory ruling permitting M. Belmont VerStandig, Inc., licensee of stations WSVA(AM) and WQPO(FM), Harrisonburg, Virginia, to enter into a time brokerage agreement whereby it would become the broker for Stonewall Broadcasting Company, licensee of station WPKZ(FM), Elkton, Virginia.[1] As indicated by coverage maps you provided, WPKZ's 1 mV/m (60 dBu) coverage contour is almost entirely encompassed by that of WQPO, and is entirely within that of WSVA's daytime 0.5 mV/m contour.

Under the proposed agreement, which is for a ten-year term with a renewable year-to-year option, Stonewall would make available its facilities 24 hours per day, seven days a week, for the programming provided by VerStandig, except for a maximum of two hours on Sunday between midnight and 6 a.m. for routine maintenance. VerStandig would provide an entertainment format, which may also include news, public service programming, promotions, contests, and commercial matter. VerStandig would be responsible for all production personnel, while Stonewall would be responsible for all technical personnel, including the station's general manager and chief engineer, who would supervise all personnel while on the station's premises. The station's general manager would also direct the day-to-day operation of the station. VerStandig would have the option of selling advertising time on WPKZ in conjunction with its own stations in Harrisonburg, or any other broadcast stations, while Stonewall would retain the advertising revenues from programming not provided by VerStandig. Although not currently contemplated by the parties, the agreement would not prohibit WPKZ's rebroadcast of programming on WSVA or WQPO in the future.

Stonewall would retain the right to suspend or cancel any program it determines is not in compliance with the programming standards set out in the agreement. Stonewall would also retain the right to decide whether to accept or reject any programming or advertisements, as well as to preempt any programming to broadcast a program of greater national, regional, or local interest or for special events. If Stonewall preempts or substitutes programming for fifteen percent or more of the station's operating hours during a single month, VerStandig may terminate the agreement. Stonewall would also be solely responsible for meeting Commission requirements with respect to public service programming and maintenance of the public inspection file, including the political file. Upon the sale of WPKZ, Stonewall would provide VerStandig with three months' notice, give it the right of first refusal, and pay VerStandig for its lost revenues if a future assignee does not assume the agreement.

The proposed agreement appears to comply with the Commission's time brokerage policy, as explained in *Roy R. Russo, Esquire*, 5 FCC Rcd 7586 (M.Med.Bur. 1990), and *Joseph A. Belisle, Esquire*, 5 FCC Rcd 7585 (M.Med.Bur. 1990) (*citing Part-Time Programming*, 82 FCC 2d 107 (1980) and *Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208 (1989)). In *Russo* and *Belisle*, we permitted stations in the same market, or those with overlapping contours, to broker time on each others' stations, because there was no indication that the brokering station had or would obtain an undue amount of control over the brokered station or that, conversely, the brokered station had or would abdicate ultimate control in the areas of finances, personnel matters, and programming. *Russo*, *supra*, at 7587, *Belisle*, *supra*. *See also Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981). Additionally, in removing time brokerage agreements from the purview of the cross-interest policy, the Commission neither set limits on the amount of time a brokered station could sell, nor on the amount of contour overlap between two stations entering into such agreements. With respect to the joint sale of advertising on both stations, the Commission eliminated its prohibition on joint sales practices in the 1986 "underbrush" proceeding. *Elimination of Unnecessary Broadcast Regulation*, 59 RR 2d 1500, 1515 (1986). Here, there is no indication that control over WPKZ's operations would be an issue in the implementation of these agreements. Because the agreement does not address certain licensee obligations, however, we remind WPKZ that it must continue to air its own station identifications, and maintain its own main studio within its principal community contour.

We will also reiterate the Commission's statement in *Reexamination of the Commission's Cross-Interest Policy*, *supra*, at 2214, that while we may approve a time brokerage agreement, the Justice Department may determine that the enforcement of antitrust laws is necessary to remedy an anticompetitive arrangement that may occur as a result of the implementation of a time brokerage agreement.

Additionally, a station that airs brokered programming 24 hours per day, as proposed in this agreement, must nevertheless remain responsive to the needs of its community of license, or risk losing its license through the denial of a renewal expectancy. *See Harriscope of Chicago, Inc.*, 5 FCC Rcd 6383, 6385 (1990)(licensee that eliminated nonentertainment and local programming by switching to STV operation not entitled to renewal expectancy). *See also Broadcast Communications, Inc.*, 93 FCC 2d 1162, 1169 (Rev. Bd. 1983), *aff'd in relevant part*, 97 FCC 2d 61 (1984), *aff'd subnom. Genesis Broadcasting Ltd. v. FCC*, 759 F.2d 969 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 946 (1985)(brokered station was entitled to strong preference for past programming, because it exercised adequate control over brokers and required inclusion of public service announcements and newscasts).

This caution applies with equal force to the licensee's compliance with the political programming laws. The licensee must oversee, and take ultimate responsibility for, the broker's advertising and programming practices with respect to the provision of equal opportunities, lowest unit charge and reasonable access to political candidates (47 U.S.C. §§ 315 and 312(a)(7)), and compliance with the political rules embodied in Sections 73.1920, 73.1930, and 73.1940 of the Commission's Rules. *See Part-Time Programming*, 82 FCC 2d at 117.

Accordingly, your request for declaratory ruling IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

FOOTNOTE

[1] According to 1990 U.S. Census Bureau statistics, the population of Harrisonburg is 30,707; that of Elkton is 1,935. In addition to WSVA(AM) and WQPO(FM), there are two AM stations, one commercial FM station, and two noncommercial FM stations licensed to Harrisonburg. In Elkton, WKPZ(FM) is the only FM station; no AM stations are licensed to Elkton.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UNITED STATES TELEPHONE ASSOCIATION — RM No. 6526

Amendment of Section 36.154 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1991; Released: April 4, 1991

By the Commission:

I. INTRODUCTION

1. On July 28, 1988, the United States Telephone Association (USTA) filed a Petition for Rule Making to amend Section 36.154[1] of the Commission's Rules which prescribes the procedures for allocating the nontraffic sensitive local loop costs (NTS costs) between the interstate and intrastate jurisdictions. USTA claims that the current procedures create a significant unanticipated hardship for certain small carriers and proposes a change in the rules to alleviate this problem. For the reasons given below, we deny this petition.

II. BACKGROUND

2. The procedures for allocating NTS costs under Section 36.154 are currently in transition. These costs were allocated according to a subscriber plant factor (SPF), which was a usage based allocator, until 1982 when the Commission decided that the SPF allocator for these costs should be frozen at the 1981 level.[2] Subsequently, the Commission decided that these costs should be allocated using an interstate allocation factor of 25 percent for all carriers. [3] At that time, the interstate allocation of these costs using the frozen SPF was as high as 85 percent for some carriers.

3. In order to mitigate the impact of this change on carriers with high SPF allocators, the Commission established a transition period for adjustment to the 25 percent interstate allocation factor. Under the transition plan originally adopted, carriers would continue to use the frozen SPF to allocate costs through 1985 and then each carrier would reduce its allocator over a four year period with a maximum limit of 10 percentage points per year reduction in these costs.[4] Subsequently, the Commission revised the transition period to eight years with a limit of five percentage points reduction per year.[5] In determining whether a carrier meets the reduction limit, the rules take into consideration any additional costs allocated to the interstate jurisdiction under the Universal Service Factor (USF) prescribed in Part 36, Subpart F.[6]

4. At the same time that the Commission decided to use the 25 percent allocator for NTS costs, it also adopted the USF.[7] The USF was established to further mitigate the impact of the change to the 25 percent allocator for carriers with high SPF allocators and higher than average NTS costs. Essentially, the USF assigns additional costs to the interstate jurisdiction for carriers with NTS costs that are significantly above the national average. The Commission established a phase-in period for the USF that corresponds to the phase-in period for the 25 percent NTS allocator.

5. In adopting these changes, the Commission acknowledged that some companies with high SPFs and average or low costs would experience substantial increases in their intrastate revenue requirements as a result of the change in NTS allocation methodology.[8] The Commission noted, however, that these companies received disproportionately large benefits under the SPF allocator because they allocated an unusually high percentage of their NTS costs to the interstate jurisdiction, which enabled them to maintain very low local exchange rates. The Commission stated that even when the new separations system is fully implemented, such companies should have average local rate levels because they have average or below average costs. Moreover, by assigning additional costs to the interstate jurisdiction for companies with above average loop costs, the USF is designed to keep the local rates of high cost companies from rising significantly above the average.

III. SUMMARY OF PETITION

6. USTA proposes that the Commission amend Section 36.154(f)[9] of the Commission's Rules. Section 36.154(f) prescribes the transitional limit of five percentage points for the annual decrease in a carrier's interstate allocation of NTS costs and provides instructions for calculating the percentage change. USTA claims that the current transition rules cause carriers with frozen SPFs in excess of 65 percent that receive USF support to experience a shift of NTS costs from the interstate to the intrastate jurisdiction in excess of the five percent limit. USTA attributes the decrease in interstate costs in excess of five percent to the inclusion of USF support as an offset in the calculation of the limit. USTA proposes to amend Section 36.154(f) by eliminating the current computation which includes the offset for USF support and substituting language that would require that the maximum reduction for SPF from year to year be limited to five percentage points without the USF offset.

7. In support of its proposal, USTA attaches a chart which purports to compare the NTS interstate revenue requirement under its proposal with the NTS interstate revenue requirement under the current rule.[10] According to USTA's calculation, its proposed revision would assign $3.8 million less to the intrastate jurisdiction than the current rule based on information it derived from the October 3, 1987 access tariff filing. USTA also states that its proposal would eliminate the complexity of the current rule.

IV. SUMMARY OF COMMENTS

8. Several parties[11] filed comments in support of USTA's petition and one party, Southwestern Bell Telephone Company (Southwestern Bell), opposed it. Essentially, Bristol Bay, GVNW, Interior, and Waitsfield reiterate some of the arguments made by USTA in its petition and generally support USTA's proposal. These commenters offer no additional arguments. Dubois, Hargray, Moapa Valley, and Utah/Wyoming also support the USTA proposal, but they do so primarily out of concern over an anticipated major "balloon payment" adjustment in 1993 to reach the 25 percent allocator, which they claim would be corrected by the USTA proposal. Moapa Valley also states that, with early shifts from the interstate to the intrastate jurisdiction, its local exchange monthly rate for residential service of $12.00 is among the highest in Nevada.

9. Southwestern Bell opposes USTA's petition because it believes USTA fails to show that the present rule is a burden for any of the local exchange carriers.[12] Southwestern Bell requests that the Commission deny USTA's petition and have carriers file waiver requests on a case-by-case basis. If the Commission determines that additional support for a carrier is warranted, Southwestern Bell suggests that such support be arranged through direct billing of interexchange carriers by the National Exchange Carriers Association (NECA).

10. In reply comments, USTA and CP National Corporation claim that reliance on a waiver process would unnecessarily increase administrative costs for both the carriers and the Commission. USTA also states that there would be no way to ensure the timeliness of a response to a waiver request, thereby creating uncertainty for these carriers. In addition, both parties believe that it is unnecessary to address the direct billing proposal suggested by Southwestern Bell in order to grant the petition.

V. DISCUSSION

11. After reviewing USTA's petition and the comments thereon, we have decided to deny the petition. Although the petition claims that the current rules create a significant unanticipated hardship for small local exchange carriers with high SPFs that receive USF support, it does not, as noted by Southwestern Bell, show that to be the case.

12. When the Commission adopted the current rules, it believed that an annual limitation of five percentage points for the decrease in interstate NTS costs, taking into consideration the USF adjustment, would provide for an orderly transition to the 25 percent allocator without placing an undue burden on the local rates of any company. For companies with average or below average NTS costs, the rules assure that the NTS costs assigned to the interstate jurisdiction will not decrease more than five percentage points from one year to the next. For example, a company with a frozen SPF of 85 percent that does not qualify for the USF high cost assistance will experience a decrease in its interstate NTS costs of five percentage points per year for 12 years, at which time it would reach the 25 percent allocator.[13] For companies with above average NTS costs that qualify for USF high cost assistance, the rules assure that the NTS costs assigned to the interstate jurisdiction will not decrease more than five percentage points per year after taking into consideration the additional costs assigned to the interstate jurisdiction under the USF. Moreover, the transition period for high cost companies would also extend beyond the prescribed eight year transition period if necessary to avoid a decrease in excess of the calculated five percentage points per year.[14]

13. In determining whether the current rules cause an unanticipated hardship, it should be noted that the Commission did not adopt the current rules with an expectation that there would be no increase in local rates. On the contrary, the Commission recognized that carriers with average or below average NTS costs and high SPFs would experience increases in their local rates. However, because these companies have average or below average costs, their local rates were not expected to increase to a point where they exceeded average rates. The Commission also expected the local rates of high cost companies with high SPFs to increase. Because these carriers would receive the benefit of the USF assistance, however, their local rates were not expected to increase to a point significantly above the average.

14. USTA's petition provided no information about the effect of the transition to the 25 percent NTS allocator on local rates. Moreover, among the commenters, only Moapa Valley included information about its local rates. We note, however, that its local residential rate of $12 does not appear unusually high in relation to the national average.[15] In order to show that the current rules are causing unanticipated hardships, it would have to be demonstrated that the rules cause local rates to significantly exceed the national average rates. This has not been demonstrated by USTA or any of the commenters.

15. The companies that expressed concern about a major balloon payment adjustment in 1993 to reach the 25 percent allocator misunderstand the current rules. Carriers that are subject to the five percentage point limitation provided in the rules will not reach the 25 percent allocator in the prescribed eight year transition period. For those carriers, the transition would continue beyond the eight year period until the 25 percent allocator is reached without exceeding the limitation of five percentage points.

16. Based on the foregoing, we do not believe that a Rule Making proceeding to amend the rules as proposed by USTA is warranted.

VI. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that USTA's petition for Rule Making to amend Section 36.154 of the Commission's Rules IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 C.F.R. §36.154.

[2] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket 80-286, 89 FCC 2d 1 (1982).

[3] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket 80-286, 96 FCC 2d 781 (1984) (*SPF Transition Decision*).

[4] *Id.* at 802-3.

[5] MTS and WATS Market Structure; and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Dockets 78-72 and 80-286, 50 Fed. Reg. 939 (December 1984).

[6] 47 C.F.R. Part 36, Subpart F.

[7] *SPF Transition Decision*, 96 FCC 2d at 791-802.

[8] *Id.* at 802-3.

[9] 47 C.F.R §36.154(f).

[10] Although USTA indicates that its chart compares its proposal with the current rules, it appears that USTA did not include the additional costs assigned to the interstate jurisdiction under the USF, as provided in the rules, when it calculated the interstate revenue requirement under the current rules.

[11] Arizona Telephone Company (Arizona Tel.); Bristol Bay Telephone Cooperative, Inc. (Bristol Bay); Dubois Telephone Exchange (Dubois); GVNW Inc./Management on its behalf and on behalf of the Cordova Telephone Cooperative (GVNW); Hargray Telephone Company, Inc. (Hargray); Interior Telephone Company (Interior); Moapa Valley Telephone Company, Inc. (Moapa Valley); Organization for the Protection and Advancement of Small Telephone Companies (OPATSCO); Utah-Wyoming Telecom (Utah/Wyoming); and Waitsfield-Fayston Telephone Company, Inc. (Waitsfield).

[12] USTA's petition indicates that the inclusion of USF in the five percentage point limitation increases the shift in revenue requirement to the intrastate jurisdiction for all affected carriers by approximately $3.8 million. Southwestern Bell notes that this shift was for only one year of the transition, and a further analysis would be necessary to assess the long term financial impact on all affected carriers. USTA, in its reply, supplemented its data by showing that over a seven year transition from 1990 to 1996, the interstate revenue requirement would be increased $16.5 million if the rule is changed.

[13] *See generally* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, *Recommended Decision*, 49 Fed. Reg. 48325, 48338 (December 12, 1984).

[14] Waitsfield-Fayston Telephone Company, Inc., Petition for Waiver of Section 36.154(f) of the Commission's Rules, 5 FCC Rcd 5933, 5934, Note 4 citing MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, (Com. Car. Bur. 1990).

[15] *See* "Telephone Rates Update," released by the Common Carrier Bureau's Industry Analysis Division, February 9, 1990, which calculated the nationwide average charge for unlimited, local residential service to be $17.16.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Application of
Duffy II Corporation
For Station KESZ-FM
Phoenix, Arizona

File No. BRH-900531A4

MEMORANDUM OPINION AND ORDER

Adopted: March 21, 1991; Released: March 27, 1991

BY THE COMMISSION:

1. The Commission has before it for consideration: (i) a Petition to Deny filed September 4, 1990, by the Arizona State Conference of Branches of the NAACP and its Phoenix, Arizona, Branch against the above-captioned renewal application; (ii) statements in opposition from the licensee; (iii) the licensee's responses to staff inquiries; and (iv) a joint request from the licensee and the NAACP filed on November 9, 1990, for approval of a settlement agreement in which the NAACP moved to withdraw the petition and requested that the Commission approve the renewal of KESZ-FM's license and the pending assignment of the license.

2. *PROCEDURAL MATTERS.* We have reviewed the settlement agreement pursuant to *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuse of the Renewal Process*, 4 FCC Rcd 4780 (1989) (*Renewal Policies Order*). The *Renewal Policies Order* states that the Commission will review all citizens agreements reached in exchange for dismissing a petition to deny to determine whether they comply with the Commission's rules. We find that the settlement agreement KESZ-FM and the NAACP have submitted complies with the Commission's rules and is, therefore, acceptable.

3. As is our practice, we have reviewed the station's Equal Employment Opportunity (EEO) program and performance pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Section 309. Review of the EEO record of KESZ-FM for the license term, as well as the information submitted in response to our inquiries, reflects a failure to comply with the Commission's EEO Rule.

4. *PLEADINGS.* In its petition to deny, the NAACP alleged that KESZ-FM failed to self-assess and modify its EEO Program adequately, and failed to comply with Commission hiring guidelines in employment of minorities. The licensee stated in its opposition that it has had an effective EEO program which has been modified and intensified during the license term. The licensee pointed out that it has hired and promoted minorities for various jobs throughout the time it has owned KESZ-FM and that it actively seeks minorities for staff positions and internships. As for its recruitment effort, the licensee submitted with its opposition a sworn statement from Kathryn Colleen Krieger, an administrative assistant at KESZ-FM, that she ensures that every officials/managers and office/clerical job opening is communicated to the Arizona Department of Economic Security, Phoenix College, VSP Temporary Agency, Chicanos Por La Causa, Arizona Alliance of Business and the Phoenix Urban League. The station reported in its opposition that one of the primary tools for attracting minority employees was its intern program. The licensee provided a sworn statement from Carla Foxx-Moore, assistant program director/music director at the station, who heads the intern program, in which she stated that six minority interns had participated in the intern program which was started in late 1986 but apparently significantly expanded in 1989. In addition, the station stated that it maintains a training program to enhance the promotion potential of its employees.

5. The Commission sent a letter of inquiry to the licensee asking for further details regarding its recruitment efforts, such as applicant, interviewee and referral data. In response to this inquiry, the licensee provided a list of all hires and related data from November 1986, when it acquired the station, to October 1990. The information revealed some recruitment but few referrals from recruitment for the full-time officials/managers and office/clerical positions, and no recruitment for the full-time on-air/professional job category or sales personnel. Moreover, it appeared from the data that minority sources were not contacted for every officials/managers and office/clerical opening. It also appeared that only three minorities had been interns.[1] To clarify the questions raised on the recruitment and internship data, the Commission telephoned the licensee to ask about the apparent discrepancies. In its response to this inquiry, which was later memorialized in a signed affidavit dated February 12, 1991, the Vice President and station manager, Gerald J. Ryan, stated that the intern program had included three minorities, as reflected in the inquiry response rather than six minorities as reflected in the opposition. He stated that when the station has openings for interns, it contacts local colleges, informs them of intern openings, and hires from applicants referred by the colleges. Regarding recruitment, Mr. Ryan stated that recruitment sources were contacted one at a time instead of concurrently, as described in the opposition. He explained that, once a suitable applicant was identified, further contacts with the station's list of sources stopped.

6. *DISCUSSION.* Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b), 73.2080 (c).

7. When a renewal application indicates a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When the application indicates inad-

equate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture or a combination thereof. Further, the Commission will designate the renewal application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967, 3974 (1987) (*Broadcast EEO*), *petition for reconsideration pending*; *see* 4 FCC Rcd 1715 (1989) (request for clarification of *Broadcast EEO* by National Association of Broadcasters) (*Clarification of Broadcast EEO*). *See also Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual Bicultural Coalition on the Mass Media v. Federal Communications Commission*, 595 F.2d 621 (D.C. Cir. 1978).

8. Our review of the concerns that had been raised by the NAACP together with the station's renewal application, annual employment reports, and replies to our inquiries reveals no evidence of discrimination but does reveal an inadequate record of EEO efforts. Nonetheless, our review leads us to conclude that no substantial and material questions of fact remain with respect to KESZ-FM. Thus, grant of its application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*). However, appropriate sanctions and remedies will be imposed. Our analysis of the licensee's EEO efforts follows.

9. The licensee's response to our inquiry letter reveals that it had 40 full-time overall hiring opportunities, 34 of which were for upper-level positions, during the period November 1986 - October 1990. The general recruitment sources it contacted were: Arizona Department of Economic Security, State Veterans Job Service, Arizona Business Alliance, National Education Center, five personnel agencies, two broadcasting schools and seven general schools and colleges. The minority-specific sources contacted included Chicanos Por La Causa and the Phoenix Urban League. The licensee did not report how many referrals came from each source, how many minority referrals it received, or how many minorities it interviewed. However, the licensee did report that its sources consistently provided minority referrals. The licensee listed all of its hires from November 1986 to October 1990, but did not identify each of the sources contacted for each opening. For most of its hires, the licensee reported only the source for the successful applicants. According to its EEO Program Report (Form 396) filed in 1990, and its responses to our inquiries, the licensee hired seven full-time employees overall from May 1989 through May 1990, and received 16 minority referrals -- four from Phoenix College, one from an employment agency, two from the Arizona Department of Economic Security, and nine walk-ins.

10. In addition to the recruitment sources contacted, the licensee reported that walk-ins and unsolicited applicants account for the vast majority of its hires. All of the 21 full-time sales persons and all of the eight full-time announcers hired from 1986-1990 were hired as a result of applicant-initiated contact. Mr. Ryan indicated that no recruitment takes place for on-air or sales positions because of the large volume of applicant-initiated contacts the station receives for those positions (150 contacts for sales and 500 for announcers annually). Of the 34 full-time upper-level employees KESZ-FM hired from 1986-1990, 31 (91.2%) resulted from applicant-initiated contact. Of the station's 40 overall full-time hires from 1986-1990, 35 (87.5%) hires were based on contact initiated by the applicants or from resumes already on file. Four of the remaining hires were referred by media and personnel organizations and one was referred by the National Education Center. Of the station's 34 full-time upper-level hires from 1986 -1990, 29 (85.3%) were for sales or on- air positions and five (14.7%) were for officials/managers positions. Two of the five officials/managers positions were filled by applicants who initiated contact with the station and the other three were hired through contact with recruitment sources. Furthermore, all six of the station's full-time lower-level hires were classified as office/clerical and only two of these employees came from an outside referral. The licensee stated that it recruited for all of its 11 officials/managers and office/clerical positions and its employment data reflect that five hires were based on outside referrals and six were walk-ins.

11. When the licensee acquired the station in November 1986, there were two Hispanic employees, one of whom was in an upper-level job.[2] Thereafter, the 1987 - 1990 employment reports show that only one Hispanic was employed at the station. The licensee hired other Hispanics through those years who did not show up on the employment reports. For example, in April 1987, the licensee hired an Hispanic announcer and in September 1990, it hired an Hispanic account executive, both of whom were in full-time upper-level positions. In addition, the licensee offered an upper-level sales position to an Hispanic man who had experience in radio sales. He turned down the offer to accept employment at a station that offered a larger client list.

12. The above information reveals that, contrary to the licensee's insistence, it did not have an effective EEO program and did not comply with the Commission's EEO Rule. In fact, the station followed no EEO program for 85.3% of its upper-level positions and implemented an ineffective program for its officials/managers and office/clerical positions. We disagree with the licensee's assertion that it adequately self-assessed KESZ-FM's EEO program, in light of its policy not to recruit applicants for most full-time upper-level positions throughout the period of its ownership.

13. The incomplete recruitment information provided by the licensee also raises concerns. Although the licensee stated in its response to our inquiry that it was providing the referral sources contacted for each position filled from November 1986 through October 1990, the number of persons who applied, the interviewees for each position, and the referral source for each person interviewed, this information was either missing or incomplete for most positions. A licensee must maintain sufficient applicant information such as referral sources and other pertinent EEO data on applicants, interviewees, and employees to enable the licensee to self-assess adequately its EEO program. *Application of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893, (1990); *Applications of Carolina Christian Broadcasting, Inc.*, 3 FCC Rcd 1907 (1988); *Application of National Capital Christian Broadcasting, Inc.*, 3 FCC Rcd 1919 (1988); and *Clarification of Broadcast EEO*, *supra*.

14. Two aspects of this record further trouble us. The licensee submitted two sworn statements in its opposition to the Petition to Deny whose facts were subsequently

changed. Regarding recruitment, all sources were not contacted each time an opening occurred in the officials/managers and office/clerical categories as Ms. Krieger indicated in her affidavit. Rather, sources were contacted one by one until a candidate was obtained. Regarding the intern program, the licensee claimed that it had six minority interns when, in fact, it had only three. Furthermore, it appears from the data that the program was not designed to provide internships leading to eventual full-time employment of minorities. Of 31 interns in the program, not one was hired for full-time employment during the license term.

15. Our concern arises from the similarities between this case and *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (*Beaumont*). In *Beaumont*, the court indicated three concerns. The court noted that evidence of discrimination includes

> the substantial under-representation of Blacks at the stations and the inadequacy of the licensee's explanation for it; the inconsistencies or misstatements contained in the licensee's communications with the Commission; and the licensee's deficient EEO record.

Id. at 507.

The court held that such evidence "raises questions as to whether the licensee engaged in intentional racial discrimination in employment," *Id.* at 507, and directed the Commission "to hold a hearing to resolve the question both about actual discrimination and about the licensee's failure to meet its affirmative action obligations." *Id.* at 510.

16. Although we find that the instant case raises significant concerns, a careful review of the facts and circumstances of this case in light of *Beaumont* indicates that the instant case does not warrant designation for an evidentiary hearing. Unlike *Beaumont*, the departure of minority employees from the station in the instant case does not raise substantial and material questions of fact. Two of the four minorities reported in the 1986 Annual Employment Report left the station before the present licensee acquired it. Moreover, we note that there is no evidence to raise a substantial and material question of fact as to whether discrimination motivated the departure of the minority who left the station before the submission of the 1987 Annual Employment Report. Also, unlike *Beaumont*, the licensee in the instant case employed some minorities throughout the license term. *See* paragraph 11, *supra*. Next, we note that while the licensee in *Beaumont* had no EEO program, the licensee in the instant case maintained an EEO program, albeit haphazard, in filling positions in the officials/managers and office/clerical categories. Regarding the inconsistent statements, we believe that the misstatements in this case differ significantly from the ones in *Beaumont*. Our inquiry to the licensee was dispatched before the Commission staff received the licensee's opposition to the Petition to Deny. We sent an inquiry letter based on our need for more information after reviewing the renewal application and the Petition to Deny. Upon our review of the opposition and the response to our inquiry, however, we noticed discrepancies and called the Vice President/General Manager to clarify the inconsistencies. In his response, which was later memorialized by signed affidavit, the Vice President/General Manager verified the information in the inquiry response as accurate. Thus, unlike *Beaumont*, the licensee in this case did not provide a series of documents conveying inconsistent statements but clarified the discrepancies immediately after our query.

17. We find this case similar to *Application of Kansas City Youth for Christ, Inc., for Renewal of License of Station KYFC (TV), Kansas City, Missouri*, 3 FCC Rcd 6866 (1988) (*KYFC*). Station KYFC(TV) had no recruitment program, although it advertised on its own station on at least a few occasions, which resulted in five referrals (race unknown) and one hire. The station did not have an active EEO program or self-assessment and its only minority full-time employees were walk-ins, as with KESZ-FM. The fact that either station employed minorities in full-time positions, therefore, was fortuitous. KYFC(TV) had three interns and various volunteers (for whom records indicating race were unknown) and maintained an on-the-job training program which resulted in the promotion of a Black female employee. KYFC(TV) had 19 full-time hires from 1983-1987, and hired two minorities, one Black and one Asian. [3] Although KESZ-FM made some recruitment efforts, they were limited to the 11 administrative positions the station filled out of its 40 full-time hires from 1986 - 1990 (27.5%). Of those 11 positions, six were filled through applicant-initiated contact. Because the station kept incomplete referral data, we do not know whether the station obtained any referrals from its sources for the six positions filled by walk-ins. Regardless, KESZ-FM had no EEO program for 72.5% of its vacancies and had an ineffective EEO program for the remainder, considering that only five of the station's 40 full-time hires (12.5%) came from some recruitment effort. In *KYFC*, we imposed a short-term renewal, a $10,000 forfeiture, and reporting conditions. While similar to *KYFC*, we believe this case is aggravated by the record when taken as a whole.

18. Accordingly, while we find that a grant of the application will serve the public interest, we find it appropriate to grant renewal for less than a full term. Also, for the repeated failures to comply with the Commission's affirmative action provisions as described above, 47 C.F.R. Sections 73.2080(b)(3), (b)(5), (c)(2), and (c)(5), we will impose a forfeiture of $15,000. Finally, though the station has indicated that it will expand its EEO efforts, we find that it is necessary to impose EEO reporting conditions to assure ourselves that the licensee's future recruitment efforts and self-assessment comport fully with our rules. *See Application of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988) (*WXEL-TV and WNFT-TV*); and *Applications of Certain Broadcast Stations Serving Communities in Michigan and Ohio*, 3 FCC Rcd 6944 (1988).

19. Accordingly, *IT IS ORDERED* that the Settlement Agreement Duffy II Corporation and the NAACP have submitted is approved and the Petition to Deny filed by the NAACP *IS CONSIDERED WITHDRAWN*.

20. *IT IS FURTHER ORDERED* that the license renewal application of Duffy II Corporation for renewal of license of Station KESZ-FM, Phoenix, Arizona *IS GRANTED FOR A SHORT-TERM* ending October 1, 1994, subject to the EEO conditions specified herein.[4]

21. *IT IS FURTHER ORDERED*, that, pursuant to Section 503 of the Communications Act of 1934, as amended, this document constitutes a Notice of Apparent Liability for forfeiture of $15,000 for the licensee of KESZ-FM.[5]

22. *IT IS FURTHER ORDERED*, that Duffy II Corporation is directed to submit an original and one copy of the following information on June 1, 1991, June 1, 1992, and June 1, 1993:

(a) For each report, a list of all job vacancies during the twelve months preceding the respective reporting dates, a list indicating job title and full or part-time status of the position, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list also should note which recruitment sources were contacted;[6] and

(b) a list of employees as of the May 1, 1991, payroll period for the first report, the May 1, 1992, payroll period for the second report, and the May 1, 1993, payroll period for the third report by job title, indicating part-time or full-time status (ranked from the highest to the lowest paid), FCC Form 395-B classification, date of hire, sex and race or national origin; and

(c) details concerning the station's efforts to recruit minorities for each position filled during the periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

23. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to the licensee as well as counsel for the NAACP.

24. In addition to the supplemental information requested above, the licensee may submit any information it believes relevant regarding the station's EEO performance and to its efforts thereunder. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In its response to our written inquiry, the licensee stated that as of October 1990, 31 interns had worked at the station, only 16 of whom were paid. Eleven interns were later hired by the station as part-time employees (including a minority walk-in). Although the station has had interns from several local colleges, KESZ-FM's recruitment practice consists of notifying colleges of openings and waiting for the colleges to send applicants.

[2] The station is licensed in Phoenix, Arizona. The Phoenix MSA labor force includes 43.2% women, 2.7% Blacks, 12.3% Hispanics, 0% Asians, and 1.6% American Indians. In KESZ-FM's 1990 Annual Employment Report (Form 395-B), it had reported that, out of 23 total full-time employees, the station employed one Hispanic (4.3%) and, out of 20 total upper-level full-time employees, KESZ-FM employed no Hispanics. The licensee reported, however, that it hired an Hispanic employee for an upper-level position in September 1990, the last month of the station's license term, bringing the percentage of Hispanics in the upper four job categories from 0% to 4.8%. The 1989, 1988 and 1987 annual employment reports show that, out of 26 total full-time employees, KESZ-FM employed one Hispanic (3.8 %). The Hispanic employee was in an upper-level position in 1987, but the station's one Hispanic employee in 1988 and 1989 was in a lower-level position. The current licensee acquired the station in November 1986. The 1986 report shows that, prior to the current licensee's ownership, KLZI-FM (KESZ-FM's predecessor) employed a total of 25 full-time employees. This included one Black (4.0%) in a lower-level position and 3 Hispanics (12.0%), two of whom were in upper-level positions, comprising 9.5% of the 21 total full-time upper-level employees. Although no party filed a challenge against KESZ-FM because of its employment of women, we have reviewed the station's record regarding women and find it to be adequate.

[3] The greater Kansas City MSA is 14% minority (10.8% Black, 2.1% Hispanic, 0.6% Asian, and 0.5% American Indian). In 1988, the station had 20 full-time employees, including one Black (5.0%) and one Asian (5.0%). In 1987, 1986, and 1985, the station employed no minorities. In 1984, KYFC(TV) employed one minority, a Black male, and in 1983, employed two minorities, both Black.

[4] In this regard, we are mindful of an application for assignment of license of Duffy II Corporation to Arizona Television Company (File No. BALH-900402HP). In the event that the license is transferred to the new licensee, the reporting conditions will apply to the assignee upon the consummation of the sale. *See Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989); *Dakos Broadcasting, Inc.*, 5 FCC Rcd 3748 (1990); *Keymarket Communications of Columbia, Inc.*, 5 FCC Rcd 579 (1990).

[5] In regard to the forfeiture, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in an attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to ability to pay should include those financial items set forth in the noted attachment.

[6] Such a list might start: 1) News Director: Officials and Managers; Full-time. 3 Applicants: 1 White female, A.W.R.T.; 1 Hispanic male, National Hispanic Media Coalition; 1 Black female, NAACP. Sources Contacted - Local Newspaper, A.W.R.T., National Hispanic Media Coalition, and NAACP. Selected - Hispanic male (08/19/91).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Contel Telephone
Operating Companies

Apparent Violations of the
Commission's Rules and Policies
Governing Transactions
with Affiliates

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 21, 1991; Released: March 29, 1991

By the Commission:

I. INTRODUCTION

1. By this *Notice of Apparent Liability for Forfeiture*, we initiate enforcement proceedings against the twenty-seven telephone operating companies of Contel Corporation (collectively, the operating companies) for apparent violations of our affiliate transaction rules. These apparent violations result from transactions between Contel Materials Management Company (CMMC), a nonregulated subsidiary of Contel created in 1988, and the operating companies. In 1988, CMMC, which provides general purchasing and supply functions as a warehousing distributor for Contel affiliates, provided services to the operating companies at costs greater than those companies legally could record on their regulated books of account. The operating companies apparently recorded these inflated costs on their regulated books of account, and recovered the costs from ratepayers through the ratemaking process.

2. We tentatively conclude that the operating companies paid CMMC $1.4 million above and beyond the fair cost of goods and services provided to them, and as a result interstate ratepayers suffered overcharges of $262,400 (which has already been refunded to ratepayers).[1] We find the operating companies apparently liable for a total forfeiture of $50,000 under Section 220(d) of the Communications Act of 1934[2] for failure to keep their regulated books of account in the manner prescribed by the Commission in Section 32.27 of the rules. [3]

II. BACKGROUND

3. Section 32.27 (the affiliate transaction rules) of the Commission's rules prescribes mandatory federal accounting requirements for recording transactions between a regulated carrier and its nonregulated affiliate on the carrier's regulated books of account.[4] The subject transactions between CMMC and the operating companies implicate only the rule governing the provision of services by a nonregulated company to a regulated affiliate. Section 32.27(d), governing the recordation method for the provision of services by a nonregulated entity to a regulated affiliate, requires the carrier to record the charge for the service at the prevailing rate if the nonregulated company provides the same service to third parties. However, if the regulated carrier receives substantially all of a service from a nonregulated affiliate which is not also provided to unaffiliated persons or entities:

> the service shall be recorded at cost which shall be determined in a manner that complies with the standards and procedures for the apportionment of joint and common costs between the regulated and nonregulated operations of the carrier entity.[5]

4. Pursuant to the Commission's procedures for enforcement of the affiliate transaction rules, Tier 1 carriers are required to file cost allocation manuals with the Commission,[6] and are also required to have an independent auditor attest to the carrier's implementation of its cost allocation manual.[7] The Bureau routinely reviews the workpapers of the independent auditors' attest audits of the telephone companies. A review of Contel's 1988 independent auditor's workpapers revealed that CMMC, in its first year of operation, earned a rate of return of 19.3%.[8] That return was well above the prescribed 12% interstate rate of return that governed the manner in which the operating companies legally could record affiliate transactions on their regulated books of account. The operating companies had apparently recorded the full charge for services provided by CMMC as regulated costs, and in turn passed on excessive costs to ratepayers. In 1989, CMMC earned a rate of return below the prescribed interstate rate of return.[9]

5. In response to the Bureau's inquiry about CMMC's return, the operating companies voluntarily reduced the capital accounts on their regulated books of account by approximately $967,000, to remove the overcharges by CMMC.[10] They also reduced their July 1990 access charge tariffs by approximately $189,000 and adjusted their price cap index to account for an exogenous change of approximately $73,400 to refund excessive charges paid by customers resulting from CMMC's excessive charges.[11]

III. DISCUSSION

6. After reviewing the independent auditor's workpapers in regard to the attest audit of the operating companies' cost allocation manual, we conclude that the operating companies appear to have violated our affiliate transaction rules.

7. The affiliate transaction rules found in Section 32.27 of the Commission's rules require regulated telephone companies to record charges at fully distributed cost when purchasing goods and services from a nonregulated affiliate which does substantially all of its business with the regulated affiliates.[12] CMMC is a nonregulated affiliate which does substantially all of its business with the operating companies.[13] CMMC earned a rate of return of 19.3% in 1988, and that 19.3% rate of return exceeds the allowable rate of return for the telephone companies. Thus, the operating companies were charged more than they were allowed to record on their regulated books of account. The operating companies apparently recorded the excessive charges and passed the costs onto ratepayers, as evidenced by their subsequent capital account adjustments and access charges tariff reduction.

8. We acknowledge the measures taken by Contel and its regulated telephone subsidiaries in addressing these apparent violations. As noted *supra*, Contel has required the operating companies to adjust downward their capital accounts by approximately $967,000. The operating companies also have reduced the revenue requirements filed in their July 1990 access charges tariff filing and their price cap index to refund the overcharges to interstate ratepayers. Throughout the Bureau's investigation, Contel and the operating companies have worked cooperatively with the Bureau's staff to correct the problems created by the 1988 earnings of CMMC. The amount involved is relatively small, and the overearnings occurred only in CMMC's first year of operations. We have taken all of these matters into consideration in developing the proposed enforcement action outlined below.

9. We find the operating companies, collectively, apparently liable for a forfeiture in the amount of $50,000 pursuant to Section 220(d) of the Communications Act of 1934 for failure to keep their regulated books of account in the manner prescribed by the Commission in Section 32.27 of the rules.[14] This amount represents a fair forfeiture considering Contel's cooperation and quick response to correct the apparent violations. We direct the operating companies to pay the specified forfeiture or to respond in writing as to why a forfeiture penalty should not be imposed or should be reduced.[15] Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation as may be pertinent.[16]

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 220(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 220(d), and section 1.80(f) of the Commission's Rules, 47 C.F.R. § 1.80(f) (1988), that the Contel telephone operating companies are collectively APPARENTLY LIABLE FOR A FORFEITURE in the amount of $50,000 for failure to follow the accounting procedures specified in Section 32.27 of the Commission's Rules, 47 C.F.R. § 32.27 (1988).

11. IT IS FURTHER ORDERED, that the Contel telephone operating companies shall within thirty days of the release date of this notice, pay the full amount of the forfeiture currently outstanding as of that date or file a response showing why the proposed forfeiture should not be imposed or should be reduced.[17]

12. IT IS FURTHER ORDERED, that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by certified mail to Contel Service Corporation, 245 Perimeter Center Parkway, Atlanta, GA 30348.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The operating companies made adjustments to correct for the overcharges in July 1990 and January 1991.

[2] 47 U.S.C. § 220(d).

[3] 47 C.F.R. § 32.27.

[4] *See* Separation of Costs of Regulated Telephone Services from Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990). *See also* 47 C.F.R. §32.27.

[5] 47 C.F.R. § 32.27(d). This requirement effectively limits the nonregulated entity to the return prescribed for the regulated entity. This is so because the standards and procedures for the apportionment of costs related to affiliate transactions require the regulated affiliate to record the charge from the nonregulated affiliate using a fully distributed costing methodology, which permits a return on investment calculated according to the prescribed rate of return for the regulated carrier. *Joint Cost Reconsideration Order*, 2 FCC Rcd at 6298, para. 133. *See also* Centel Corporation, Petition for Clarification of Section 32.27(d) of the Commission's Rules Governing the Valuation of Services Provided to a Telephone Carrier by an Affiliated Company, 4 FCC Rcd 2241 (Com.Car.Bur. 1989).

[6] Only Tier 1 companies and American Telephone and Telegraph Company must file cost allocation manuals with the Commission. *Joint Cost Order* at 1304, para. 47.

[7] *Id.* at 1330, paras. 254-59.

[8] We note that these workpapers indicate that the independent auditor had questions in regard to CMMC's return and the Commission's affiliate transaction rules. We are concerned that the independent auditor not only did not direct such questions to this Commission, but also did not bring to our attention this uncertainty during the attest audit process. At a minimum, we would expect the independent auditor to bring to our attention any uncertainties with respect to our rules and the cost allocation manuals. The better solution is for the independent auditors to direct interpretative questions to this Commission through its Accounting and Audits Division.

[9] CMMC's 1989 rate of return was 11.58%.

[10] The operating companies initially adjusted downward their capital accounts by approximately $835,000 in July 1990. In January 1991, the operating companies realized that this figure was insufficient and adjusted downward these same accounts by approximately $132,000.

[11] The price cap index adjustment resulted from the operating companies' initial miscalculation of the overcharges suffered by interstate ratepayers.

[12] 47 C.F.R. §32.27(d).

[13] *See* Letter to Kenneth P. Moran, Chief, Accounting and Audits Division, from Lawrence Keller, dated July 3, 1990 (indicating that "telephone" comprises 93.7% of CMMC's "average rate base").

[14] We remind the operating companies that the forfeiture amount shall not be included in net income determinations for ratemaking purposes, and that the forfeiture amount shall be recorded in Account 7370, Special Charges.

[15] We leave to the operating companies' reasonable discretion the apportionment of the forfeiture among those companies.

[16] *See* 47 C.F.R. § 1.80(f)(3).

[17] Such forfeiture amounts should be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, Federal Communications Commission, Box 19209, Washington, D.C., 20036, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M Street, N.W., Washington, D.C., 20554.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS, CORP. File No. I-T-C-91-048

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of authorized common carrier services between the United States and the British Virgin Islands, Grenada, St. Lucia and St. Vincent.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 27, 1991; Released: April 4, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed by MCI Telecommunications Corp (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) and interconnecting facilities for the provision of its authorized common carrier services between the U.S. and the British Virgin Islands, Grenada, St. Lucia and St. Vincent and beyond. The application was placed on public notice on January 25, 1991. No comments were received.

2. MCI is a non-dominant international carrier currently providing international services between the U.S. and various international points. MCI has been authorized to acquire and operate circuits in the PTAT-1 cable system for service between the U.S. and the United Kingdom, the Republic of Ireland, Bermuda and points beyond. It now proposes to acquire and operate an additional one-half interest in two E-1 circuits[1] in the PTAT-1 cable. Since MCI does not currently offer direct services between the U.S. and the points requested, the capacity in PTAT-1 will not be used to divert any portion of its traffic from the existing common carrier facilities.

3. The Commission stated in its *Private Submarine Cable Decision* [2] that it would require common carriers wishing to acquire capacity in the PTAT-1 cable system to file applications pursuant to Section 214 of the Communications Act. [3] In this context, we find that MCI's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[4] Furthermore, we find that MCI's application does not raise any economic impact issues.[5]

4. Upon consideration of the application, IT IS HEREBY CERTIFIED that the public convenience and necessity require the acquisition of the requested facilities for the provision of direct services between the U.S. and the British Virgin Islands, Grenada, St. Lucia and St. Vincent by MCI.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-91-048 IS GRANTED, and MCI is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate two E-1 circuits in the PTAT-1 cable between the cablehead at Manasquan, New Jersey and the cablehead in Bermuda;

b. operate two E-1 circuits in its existing connecting facilities between the Manasquan, New Jersey PTAT cablehead and MCI's West Orange, New Jersey operating center;

c. acquire, on an IRU basis, a one-half interest in and operate two E-1 circuits in the Caribbean Atlantic Cable System (CARAC) between Bermuda and Tortola;

d. acquire and operate necessary connecting facilities in Tortola between the CARAC cablehead and the Digital Eastern Caribbean Microwave System (DECMS);

e. acquire, on an IRU basis, a one-half interest in and operate 30 circuits in the DECMS at Tortola for connection with Grenada (seven circuits), St. Lucia (sixteen circuits) and St. Vincent (seven circuits); and

f. use said facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S., on the one hand, and the British Virgin Islands, Grenada, St. Lucia and St. Vincent, on the other hand, and beyond.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to Private Transatlantic Telecommunications Systems, Inc. under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] An E-1 circuit is equivalent to a capacity of 2.048 Mbps.

[2] *Private Submarine Cable Decision*, 100 FCC 2d 1033 (1985).

[3] This requirement was restated in the *International Competitive Carrier* decision in which the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier Policies*, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[4] The Commission places no special burdens on any carrier making an application for private cable capacity. *See Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables*, File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[5] The Commission stated that it has authority under the public interest mandate of Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AAA ANSWERING SERVICE, INC.
d/b/a ANSWERING SERVICE &
DOCTOR'S EXCHANGE

File No. I-T-D-91-005

Application for authority to close
VHF Public Coast Station KQU618,
Signal Mountain, Tennessee.

ORDER AND AUTHORIZATION

Adopted: March 27, 1991; Released: April 4, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed on January 30, 1991 by AAA Answering Service, Inc., d/b/a Answering Service & Doctor's Exchange (AAA), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from VHF Public Coast Station KQU618 located in Signal Mountain, Tennessee. The station provides public correspondence between vessels on the Tennessee River in Hamilton County, Tennessee and land-based telephone subscribers. The application was placed on public notice on February 6, 1991. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application, AAA states that the provision of service through the station has declined steadily since the advent of alternative cellular service by Southwestern Bell. In this regard, AAA notes that prior to the advent of cellular service by Southwestern Bell, Station KQU618 served between 60 and 100 subscribers per month. However, with Southwestern Bell's cellular service as a less expensive alternative, AAA notes that the number of calls handled decreased from 54 in October 1990 to zero in December 1990. As a result, AAA estimates that its maximum total revenues for the twelve month period ending December, 1991 will be no more than $236.76, while its anticipated costs will be $2,964. AAA notes that if the station continues not to receive any calls from its few remaining subscribers, it will not generate any revenue to offset losses.

4. In light of the alternative service available through cellular telephone, AAA's lack of revenues due to the migration of subscribers to cellular telephone, AAA believes that the public would not be adversely affected by the closure of station KQU618. AAA states that cellular service, provided by Southwestern Bell and emergency monitoring and communications services, provided by the United States Coast Guard Ohio Valley Group, cover the entire service area of Public Coast Station KQU618.

5. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via Station KQU618.

6. Accordingly, IT IS ORDERED that application File No. I-T-D-91-005 IS GRANTED, and AAA is authorized to discontinue service via its Public Coast Station KQU618 at Signal Mountain, Tennessee.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-91-058

Application for authority to acquire and operate facilities for direct service between the U.S. and Poland, and beyond.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 27, 1991; Released: April 4, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed by MCI Telecommunications Corp. (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between the U.S. and Poland. The application was placed on public notice on February 13, 1991. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the acquisition of the requested facilities for the provision of direct service between the U.S. and Poland, and beyond by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-058 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 120 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Poland furnished by MCI's correspondent in Poland;

b. own and operate 120 voice-grade circuits in the Andover, Maine earth station;

c. own and operate 120 voice-grade connecting circuits between the Andover earth station and MCI's operating center in West Orange, New Jersey; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S. and Poland, and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Poland. A copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FIBERLINE NETWORK COMMUNICATIONS, LIMITED PARTNERSHIP — File No. I-T-C-91-059

Application for authority to operate as an international resale carrier.

U.S. FIBERLINE COMMUNICATIONS, INC. — File No. I-T-C-91-060

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 27, 1991; Released: April 4, 1991

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on February 5, 1991 by Fiberline Network Communications, Limited Partnership (FNC) and US Fiberline Communications, Inc. (USF), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on February 13, 1991. No comments were received.

2. The applicants are domestic resale carriers who propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public on a resale basis by FNC and USF.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-059 and I-T-C-91-060 ARE GRANTED; and FNC and USF are authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, Long Distance Services of Washington, Inc.'s Tariff F.C.C. No. 1, Satellite Business Systems' Tariff F.C.C. No. 4, Allnet's Tariff F.C.C. No. 5, FTC Communications Inc.'s Tariff F.C.C. No. 23, RCI Corp.'s Tariff F.C.C. No. 2, TRT International's Tariff F.C.C. No. 2, St. Thomas and San Juan Telephone Co.'s Tariff F.C.C. No. 1, Hawaiian Telephone Co.'s Tariff F.C.C. No. 1, Teleconnect Co.'s Tariff F.C.C. No. 3, and Southernet Services, Inc.'s Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548 (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL ACCESS LTD. File No. I-T-C-91-054

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 27, 1991; Released: April 4, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 25, 1991 by International Access Ltd. (IAL), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on February 6, 1991. No comments were received.

2. IAL is a start-up company which proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by IAL.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-91-054 IS GRANTED, and IAL is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-91-053

Application for authority to acquire and operate facilities for direct service between the U.S. and South Africa.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 27, 1991; Released: April 4, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 25, 1991 by US Sprint Communications Company Limited Partnership (US Sprint), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between the U.S. and South Africa. The application was placed on public notice on February 6, 1991. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and South Africa by US Sprint.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-053 IS GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 72 voice-grade satellite circuits between the international earth station at Beeline, Florida and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in South Africa furnished by US Sprint's correspondent in South Africa; and

b. use the facilities in a. above to provide US Sprint's regularly authorized services, including switched voice services, between the U.S. and South Africa and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in South Africa and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-64

In the Matter of

American Telephone and Telegraph Company — RM-7245

Petition for Rule Making

ERRATUM

Released: April 4, 1991

1. On March 25, 1991, the Commission released a Notice of Proposed Rule Making in CC Docket No. 91-64, FCC No. 91-71, in the the above-captioned proceeding. The first sentence of the Quality Assurance Principles section of that notice should be corrected to read as follows:

A. *Quality Assurance Program*. The Quality Assurance Program ("QAP") to be adopted by the FCC is intended to ensure that interexchange carriers ("IXCs") which make more than [number to be determined] outbound telemarketing calls per year are not making blatantly false and misleading claims (as defined in Section D below) in their telemarketing sales practices.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-82

In re Applications of

VIRGIL L. PEARMAN File No. BPH-871110MK

W & B BROADCASTING, INC. File No. BPH-871110MU

For Construction Permit for
New FM Station, Channel 278A
Radcliff, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1991; Released: April 4, 1991

By the Commission:

1. Now before the Commission is an application filed on October 29, 1990 by Virgil L. Pearman for review of the Decision of the Review Board in this case, 5 FCC Rcd 5697 (1990), and an opposition to Pearman's appeal filed on November 6, 1990 by W & B Broadcasting, Inc. In the decision under appeal the Review Board concluded that it would better serve the public interest to grant W & B's application than to grant Pearman's competing application because neither was to be preferred under the divestiture criterion and W & B deserved full quantitative integration credit with enhancements, whereas Pearman deserved no integration credit. We affirm that conclusion. Those of Pearman's arguments that merit response are addressed below.

2. *Diversification.* W & B is the licensee of WASE-FM, Fort Knox, Kentucky, but was given no diversification demerit because it had timely pledged to divest itself of that interest should the Commission grant its application. *Virgil L. Pearman*, (Initial Decision of Administrative Law Judge Edward J. Kuhlman), 5 FCC Rcd 1830, 1831 ¶ 8 (1990). Pearman contends, in effect, that an applicant, such as W & B, who owns an existing station of the same class as the one for which it is applying and serving the same market, should not be able to avert a diversification demerit merely by pledging to divest the existing station in the event it receives a grant for the new one. It is preferrable for purposes of diversification, Pearman argues, to grant the application of someone without existing media interests than to grant such a competing application, because the latter, if granted authority for the new station, will be able to choose its competition by selecting the buyer of the existing station. Although Pearman raised this argument below, the Board declined to comment on its merits, asserting that it had no authority to resolve the question. 5 FCC Rcd at 5700 n.4.

3. The argument does not persuade us that Pearman deserves any diversification preference, let alone a decisive one. It is not self-evident, and Pearman states no reason for assuming, that permittees pledged to divest existing stations in the markets where they would establish new ones of the same class would be likely to select the purchasers of the stations to be divested for anti-competitive reasons rather than in response to the normal incentive to sell to the purchaser willing to pay the highest price. Thus, Pearman has not established that there is a likelihood that W & B would act on anticompetitive motives in disposing of its current station or that the potential harm to the public interest from its sale of the station is such as to warrant the award of a diversification preference.

4. *Misrepresentation or lack of candor.* Pearman contends that the Board erred by refusing to remand under an issue to determine whether a W & B principal, William Walters, conspired to deceive the Commission by participating in the filing of a sham application. Pearman alleges that Walters is a 50 percent owner of Johnson Radio Company (Johnson), a two-tiered corporate applicant for an FM station in Campbellsville, Kentucky; that Walters is responsible for defraying $253,000 of Johnson's costs while the voting stockholder, Janet Johnson McKay, is merely responsible for $3,000; that Walters effectively admitted in testimony that he has latent managerial control over Johnson; that, according to Walters' testimony, he had known McKay for only four or five months prior to filing the application and they had had no prior business dealings; that Walters also testified that McKay has had no prior involvement in the prosecution of an FCC application; that Johnson's program statement is identical to the one that Walters prepared for W & B; that Walters chose Johnson's business attorney; and that Walters retains the right to prohibit a pledge of any of Johnson's corporate assets. Pearman maintains that it has presented a *prima facie* showing that the Johnson application is a sham and that the Commission therefore cannot trust Walters to deal with it truthfully.

5. The Board declined to enlarge the issues on the basis of Pearman's showing, stating that the questions that he raised in this regard should be addressed in the Campbellsville case first. 5 FCC Rcd at 5698 ¶ 8. Pearman responds that the Commission cannot properly ignore his (alleged) *prima facie* showing merely because the asserted facts relate to another application. Postponing consideration of the matter, he argues, would be against the public interest in barring unqualified applicants from receiving licenses and would deprive him of his right to due process.

6. Pearman has not supported his accusation of deceit with a showing sufficient to warrant the enlargement of hearing issues. The relevant concern here is not whether the facts alleged, if proven, would require denial of integration credit, but whether Pearman has raised a substantial and material question as to Walters' honesty in dealing with the FCC.[1] Even assuming that the facts alleged provide a basis for denying Johnson any integration credit in the Campbellsville proceeding, it does not necessarily follow from that premise that the allegations warrant adding an issue as to Walters' honesty there or here. Pearman has not shown or alleged that Walters or Johnson concealed information that they were obliged to disclose or ignored corporate formalities, and it has presented no specific evidence of misrepresentation. It

merely alleges that information that Walters and Johnson have openly reported affords some basis to conclude that Johnson's principals might not sincerely intend to carry out that applicant's integration proposal. This showing is not sufficient to support the addition of a misrepresentation issue in this proceeding.

7. *Past broadcast record.* Pearman contends that the issues should have been enlarged to allow a determination as to whether W & B should be charged with a demerit for a poor broadcast record. Pearman has no right to complain on this ground because it did not ask the Board to grant such relief. The Commission does not grant applications for review in order to resolve questions that were not raised below.[2] 47 C.F.R. § 1.115(c). In any event, Pearman's showing (which consists of unsworn statements, most of which complain that WASE did not adequately cover local events, particularly athletic contests, in certain areas outside of its community of license) is too insubstantial to satisfy the high threshold standard for the addition of a past programming issue. *See Omaha TV 15*, 4 FCC Rcd 730, 735 ¶ 39 (1988).

8. *W & B's integration credit.* Pearman argues that W & B deserves no integration credit because its principals persistently contradicted each other in testifying about their functions at WASE, which they would allegedly continue at the proposed station. The Board did not squarely address this contention, but the omission was harmless, because the testimony that Pearman cites does not disclose any material discrepancy.

9. Pearman alleges that William Walters, W & B's 70 percent owner, testified that he is WASE's general manager whereas J. Michael Baldwin, its 30 percent owner, testified that *he* is the general manager. In fact, Walters did not say that he is the general manager; on the contrary, he denied that he had the title of general manager, although he said that his duties were "somewhat" like those of a general manager. Tr. at 138. The latter assertion is not inconsistent with Baldwin's testimony. Pearman alleges that Baldwin and Walters contradicted each other in that each represented that he supervises all of the station's employees, but neither said that he alone supervises them. In fact, Walters said that he is the overall supervisor but that he consults daily with Baldwin and that they share management functions, and Baldwin said that he oversees activities at the station but confirmed that Walters had the final say. Tr. at 96, 105, 140, 146. Pearman alleges that each contradicted the other by asserting that he, himself, was in charge of programming, news, public affairs, engineering, traffic, and business management. In fact, only Baldwin said that he was primarily in charge of those activities; Walters merely said that he had coordinate responsibility in those areas. Tr. at 100-01, 142-46. Pearman alleges that Baldwin said that he had helped Walters to prepare program service statements but that Walters denied this. In fact, Baldwin said that he had discussed the program statement with Walters but could not recall who had actually written it; Walters merely testified that he had been primarily responsible for writing it, without denying that Baldwin had been involved in the project. Tr. at 103-04, 116. Thus, Pearman has failed to show that the Board erred in awarding 100 percent integration credit to W & B.

10. ACCORDINGLY, IT IS ORDERED that the application for review filed by Virgil L. Pearman on October 29, 1990 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In *Royce International Broadcasting*, 5 FCC Rcd 7063 at 7065 n.6, we noted that in particularly egregious cases an issue may be specified to determine whether an applicant engaged in disqualifying misrepresentations. However, in the absence of a prima facie showing of a prior design or other improper intent, a mere showing of an unintentional or inadvertent breach of the required insulation, between the nominally active and passive owners, does not provide a basis for addition of a qualifying issue.

[2] W & B asked the Board to reverse the ALJ's denial of a motion for addition of a *good* past programming issue. Pearman contended in opposition that the ALJ's ruling was correct but declared that it would not object to the addition of an issue concerning W & B's programming provided that it would be allowed to produce evidence that W & B had a poor record.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-421

In re Applications of

SCIOTO BROADCASTERS, LIMITED PARTNERSHIP — File No. BPH-870515MU

MID-OHIO RADIO LIMITED — File No. BPH-870515NM

HORACE E. PERKINS — File No. BPH-870515NP

For a New FM Station on
Channel 298A, Columbus, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1991; Released: April 4, 1991

By the Commission:

1. We have before us two applications for review of the Review Board's final decision in this case, 5 FCC Rcd 5158 (1990), one filed on September 13, 1990 by Mid-Ohio Radio Limited (Radio) and the other filed on September 14 by Scioto Broadcasters Limited Partnership. Horace E. Perkins filed replies to the applications for review on September 28 and October 1.

2. Although we agree with the Board's resolution of this case, two matters warrant brief comment. Radio objects to the grant of summary decision on the financial issue specified against Perkins, asserting that the substitution of a new financial proposal should not relieve Perkins of the need to establish the validity of his initial financial proposal. However, Perkins filed a timely amendment of his proposal as a matter of right under 47 C.F.R. §73.3522(b)(2). *See* 5 FCC Rcd at 5159 ¶ 9. Thus, any questions concerning the adequacy of Perkins' prehearing financial showing became moot. *See Aspen FM, Inc.*, 6 FCC Rcd _____, _____ ¶ 13 and n.6 (1991). Radio challenges the reduction of its quantitative integration credit. However, in view of Perkins' clear qualitative superiority, 5 FCC Rcd at 5165 n.6, the questions raised in this aspect of Radio's application for review have no decisional relevance and, therefore, need not be considered further.

3. ACCORDINGLY, IT IS ORDERED that the applications for review filed by Mid-Ohio Radio Ltd. on September 13, 1990 and by Scioto Broadcasters, Ltd. Partnership on September 14, 1990 ARE DENIED and that the application of Horace E. Perkins, File No. BPH-870515NP, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Telephone Operating Companies — Transmittal No. 640

Tariff F.C.C. No. 1

ORDER

Adopted: March 28, 1991; Released: March 29, 1991

By the Chief, Common Carrier Bureau:

1. On December 14, 1990, the GTE Telephone Operating Companies (GTOC) filed Transmittal No. 640 to institute new nonrecurring charges for unauthorized primary interexchange carrier (PIC) changes. On December 31, 1990, MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend the tariff and GTOC filed a reply on January 10, 1991. The tariff is scheduled to take effect on April 1, 1991.

2. GTOC's current PIC change charges range from $3.20 to $4.48 per change. GTOC Description and Justification (D&J) at 2. Under Transmittal 640 the nonrecurring charge for unauthorized PIC changes on business or residential lines or trunks ranges from $9.04 to $16.20 per change, while the nonrecurring charge per change for unauthorized PIC changes on public telephone lines ranges from $21.39 to $30.21 per change. D&J at 6. GTOC contends that the new charges recover costs for work operations that are in addition to those required for normal PIC change activities.

3. MCI argues that GTOC's cost support data do not meet the requirements of Section 61.38 of the Commission's Rules, 47 § C.F.R. 61.38, with regard to its estimates of labor cost generated by PIC change investigations. MCI Petition at 2. MCI complains that GTOC's estimates for the number of minutes required by the work tasks associated with unauthorized PIC changes are unsubstantiated by supporting documentation. *Id.* at 3. It asserts that the estimates are questionable because GTOC uses the same time estimates for all jurisdictions, despite the fact that several of them have relatively higher demand forecasts for unauthorized PIC changes. *Id.* at 4. MCI alleges that the lack of adequate demand data casts doubt on the validity of the cost support, and that these deficiencies are a sufficient basis on which to suspend or reject the transmittal. *Id.* at 4-5. Finally, MCI argues that the terms and conditions of the tariff are unreasonably vague in violation of Section 61.54(j) of the Commission's Rules, 47 C.F.R. § 61.54(j). Specifically, MCI objects to the tariff language that requires an IC to produce "a letter of agency or confirmation from the end user or agent," because the tariff does not define what constitutes "confirmation." *Id.* at 5.

4. GTOC replies that its cost support material is adequate and that the work time estimates accurately represent actual work activities. GTOC Reply at 2. It maintains that, contrary to MCI's assertion, it used historical data to develop forecasts and revenue projections in accordance with Section 61.38 of the Rules. *Id.* at 4. GTOC disputes MCI's claim that the charges are unreasonable in general by comparing them to charges filed by other LECs. *Id.* at 2-3. GTOC asserts that the total time reported by the GTOCs to resolve disputed PIC changes for business and residential lines is well within the range reported by Bell Atlantic in its Transmittal No. 351[1] and by BellSouth in Transmittal No. 294.[2]

5. GTOC also maintains that use of an average time estimate and different demand levels for the GTOC jurisdictions is appropriate. *Id.* at 4. It states that although demand varies by jurisdiction, there must be a separate investigation for each line with a disputed change since PIC changes are usually made line by line. Under these circumstances, GTOC claims, few measurable economies of scale result and the total number of investigations performed is irrelevant to the cost per investigation. *Id.* at 4. With respect to MCI's vagueness charge, GTOC responds that the disputed tariff language has been included in GTOC Tariff F.C.C. No. 1 since its Transmittal No. 295 became effective on November 16, 1987. *Id.* at 5. GTOC states further that the paragraph containing this language was included at the direction of the Commission. *Id., citing* Illinois Citizens Utility Board Petition for Rulemaking, Memorandum Opinion and Order, 2 FCC Rcd 1726 (1987).

6. The Common Carrier Bureau has reviewed GTOC's Transmittals 640 and 662, the petitioner's assertions, and related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to require rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate GTE Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 640, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Bell Atlantic Transmittal 351 became effective May 8, 1990. Bell Atlantic Telephone Companies, Transmittal No. 351, Order, 5 FCC Rcd 2990 (Com.Car. Bur. 1990).

[2] BellSouth Transmittal 294 became effective May 2, 1990. BellSouth Telephone Companies, Transmittal No. 294, Order, 5 FCC Rcd 2991 (Com.Car. Bur. 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 2874, 2981

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: March 28, 1991; Released: March 29, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2874 and 2981 to introduce Virtual Telecommunications Network Service (VTNS) Option 85. Following substantially complete installation, the rates for Option 85 are stabilized for a five-year term, with an option for two one-year extensions if AT&T and the customer agree. *See* AT&T Transmittal No. 2874 Description and Justification (D&J) at 1-4. The basic charge for Option 85 is $274,600 per month. *Id.* at 5. According to AT&T, Transmittal 2981 corrects the Domestic Data Transmission Capability (DTC) Volume Pricing Plan to specify that the discounts are applicable to a customer's total number of DTC network components, not just additions and deletions. AT&T claims that the methodology for the DTC Volume Pricing Plan is the same as that used in existing VTNS options. AT&T also alleges that the cost support material submitted with Transmittal No. 2874 reflects the application of the discounts as proposed in Transmittal No. 2981 and thus is not changed by this filing. *See* AT&T Transmittal No. 2981.

2. US Sprint Communications Company Limited Partnership (Sprint), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Option 85 on February 14, 1991. AT&T filed a reply on February 25, 1991. Petitioners contend that Option 85 raises the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand* [1] and must be reviewed in light of the remand. *See* Sprint Petition at 5; Williams Petition at 2 & n.3; CompTel Petition at 4. Petitioners argue that AT&T has failed to demonstrate that Option 85 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. *See* Sprint Petition at 6-9; Williams Petition at 3-14 (comparing the rates for Option 85 to those for Option 6); CompTel Petition at 4-6, 11. Petitioners also allege that Option 85's rates vary without justification from other options under Tariff 12 and are thus discriminatory. *See* Sprint Petition at 9-10; Williams Petition at 14-19.; CompTel Petition at 11.

3. Williams and CompTel argue that Option 85 impermissibly bundles 800 Service with Software Defined Network Service in violation of Section 201(b) of the Communications Act. *See* Williams Petition at 30-31; CompTel Petition at 6-8. These petitioners also contend that AT&T's cost support is inadequate. *See* Williams Petition at 25-27; CompTel Petition at 10-12. Williams and CompTel further allege that Option 85 violates the Commission's policy against geographic rate deaveraging and that it is not generally available. *See* Williams Petition at 28-29, 22-24; CompTel Petition at 8-10.

4. Williams argues that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. Williams Petition at 27-28. Williams also contends that Option 85 may violate Sections 201(b), 202(a), or 503(a) of the Communications Act because the provision forgiving tariffed termination charges is either a rebate or an unreasonable preference. *Id.* at 20-22. In addition, Williams argues that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if Option 85 takes effect. *Id.* at 33-35.

5. AT&T replies that the *Tariff 12 Remand* creates no basis to reject or suspend new or revised VTNS offerings. Rather, AT&T argues that it confirms AT&T's right to compete effectively in the large user market. AT&T Reply at 6. AT&T contends that it has shown in numerous prior pleadings that all of the petitioners' claims are without merit. *Id.* at 2-3. AT&T also asserts that Williams' claim that usage rates for Option 85 are unreasonably discriminatory compared to rates for Option 6 is unfounded. AT&T argues that comparisons among individual rate elements in different VTNS options are not meaningful because Tariff 12 options are integrated service packages which necessarily contain different individual rate elements and different tradeoffs among rate elements. AT&T contends that Tariff 12 options are developed and priced as a whole to produce positive contributions to AT&T's net revenues and the fact that any one element may be priced higher or lower does not show that the package is more or less favorable overall. AT&T also charges that Williams' comparison is inaccurate because it does not take into account the dedicated service components in each option, differences in customers' calling patterns, or the difference in the length of the minimum service commitments. *Id.* at 3-5.

6. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2874 and 2981, the petitions filed by Sprint, Williams, and CompTel, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

7. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See Tariff 12 Remand*. Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission's decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2874 and 2981 take effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

8. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2874, filed by US Sprint Communications Company

Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

9. IT IS FURTHER ORDERED that Transmittal Nos. 2874 and 2981 take effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990) *(Tariff 12 Remand), rev'g and remanding* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 *(Tariff 12 Order), recon. denied*, 4 FCC Rcd 7928 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2847

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: March 28, 1991; Released: March 29, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2847 to introduce Virtual Telecommunications Network Service (VTNS) Option 84. Following substantially complete installation, the rates for Option 84 are stabilized for a four-year term, with an option for a one-year extension if AT&T and the customer agree. *See* AT&T Transmittal No. 2847 Description and Justification (D&J) at 1-4. The basic charge for Option 84 is $68,500 per month. *Id.* at 5.

2. US Sprint Communications Company Limited Partnership (Sprint), MCI Telecommunications Corp. (MCI), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Option 84 on January 30, 1991. AT&T filed a reply on February 8, 1991. Petitioners contend that Option 84 raises the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand* [1] and must be reviewed in light of the remand. *See* Sprint Petition at 5; MCI Petition at 2; Williams Petition at 2; CompTel Petition at 3. Several petitioners also argue that Option 84 impermissibly bundles 800 Service with Software Defined Network (SDN) Service in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). *See* MCI Petition at 4-5; Williams Petition at 27-28; CompTel Petition at 6-7.

3. Sprint argues that AT&T has failed to demonstrate that Option 84 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. Sprint Petition at 6-8. Further, Sprint contends that Option 84's rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id. at 8-9.*

4. MCI charges that Option 84 is comprised of constituent offerings that are available under standard AT&T tariffs and Tariff 12, and that AT&T has not provided adequate cost support to justify price differences between or among these services. MCI also contends that the Commission will need to review the underlying contracts to determine reliably whether price differences between Option 84 and other Tariff 12 options are justified. MCI Petition at 3-5 & 5 n.7.

5. Williams argues that Tariff 12 options are not generally available and that AT&T's cost support is inadequate. Williams Petition at 20-24. *See also* CompTel Petition at 7-9. Williams also claims that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. Williams Petition at 25. Williams further contends that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if Option 84 takes effect. Williams Petition at 31-33.

6. AT&T replies that the *Tariff 12 Remand* creates no basis to reject or suspend new or revised VTNS offerings. Rather, AT&T argues that it confirms AT&T's right to compete effectively in the large user market. In addition, AT&T contends that the Commission correctly found that integrated service packages are not "like" combinations of piece-part services obtained under AT&T's other tariffs. AT&T also argues that claims of discrimination among VTNS options are unfounded because all options are generally available (and generate positive net revenues). AT&T further contends that since VTNS is not "like" a combination of separately tariffed services such as 800 and SDN, any prohibition against such an offering would not apply. Finally, AT&T claims that allegations of inadequate cost support are totally unfounded. AT&T Reply at 3-6.

7. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2847, the petitions filed by Sprint, MCI, Williams, and CompTel, and related pleadings. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

8. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See Tariff 12 Remand*. Although this transmittal does not present new questions that warrant investigation at this time, it could be affected by the Commission's decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal No. 2847 takes effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

9. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2847, filed by US Sprint Communications Company Limited Partnership, MCI Telecommunications Corp., Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

10. IT IS FURTHER ORDERED that Transmittal No. 2847 takes effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone;
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990) (*Tariff 12 Remand*), *rev'g & remanding* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-50

In re Application of

MARY MORAN File No. BPCT-881223KF

LORETTA SALAZAR File No. BPCT-890214KE

For Construction Permit for a
New TV Station on Channel 50
Albuquerque, New Mexico

HEARING DESIGNATION ORDER

Adopted: February 27, 1991; Released: April 4, 1991

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 50, Albuquerque, New Mexico.

2. No determination has been reached that the tower height and location proposed by Loretta Salazar would constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

3. Ms. Salazar is President, Director, and holds a 78.75% interest of Guadalajara Chile Pepper Company, licensee of radio station KIDI(FM), Albuquerque, New Mexico. This interest raises a multiple ownership question. However, Ms. Salazar has pledge to divest her interest in radio station KIDI(FM) if she is the successful applicant in this proceeding. Accordingly, a grant of a construction permit to Ms. Salazar will be appropriately conditioned.

4. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Loretta Salazar, whether there is a reasonable possibility that the tower height and location proposed by her would not constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That in the event of a grant of the application of Loretta Salazar, it will be conditioned as follows:

Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that Loretta Salazar has divested herself of all interest in and connection with the licensee of station KIDI(FM), Albuquerque, New Mexico.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

8. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,760 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

9. IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara Kreisman, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-63

In re Applications of

BANNER BROADCASTING CORPORATION — File No. BPCT-900703KI

ARKANSAS RURAL TELEVISION COMPANY — File No. BPCT-900821KF

For Construction Permit
for a new Television Station on
Channel 48 in Jonesboro, Arkansas

HEARING DESIGNATION ORDER

Adopted: March 12, 1991; Released: April 4, 1991

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on channel 48, Jonesboro, Arkansas.

2. No determination has been reached that the tower height and location proposed by Arkansas Rural Television Company would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

3. Except as indicated by the issues specified below, the applicants are qualified. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Arkansas Rural Television Company, whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

5. IT IS FURTHER ORDERED, That The Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

6. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,760 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-71

In re Applications of

Laughlin Broadcasting, Limited Partnership (hereafter "LBLP")	File No. BPH-890913MF
William E. Fitts (hereafter "Fitts")	File No. BPH-890913MJ
First Broadcasting, Inc. (hereafter "First")	File No. BPH-890913MO
Desert Broadcasting, Inc. (hereafter "Desert")	File No. BPH-890913NA
Thomas M. Eells (hereafter "Eells")	File No. BPH-890914MF
Playa Del Sol Broadcasters (hereafter "Playa")	File No. BPH-890914MM
Irvin Davis d/b/a Mountain View Broadcasting Company (hereafter "Davis")	File No. BPH-890914MP
Patricia A. Korn (hereafter "Korn")	File No. BPH-890914MR
Tuna Communications, Inc. (hereafter "Tuna")	File No. BPH-890914NA
Southern Nevada Broadcasting, A Limited Partnership (hereafter "Southern")	File No. BPH-890914NB
John Brush, Mark McVey, Jeff Linder, Diane Lysiak (hereafter "Brush")	File No. BPH-890914NE
Radioactive Communications, Inc. (hereafter "Radioactive")	File No. BPH-890914NG
SOTO, Inc. (hereafter "SOTO")	File No. BPH-890914NL
Martin J. Kravitz, d/b/a Nevada FM Broadcasters (hereafter "Kravitz")	File No. BPH-890914OA

For Construction Permit for a New FM Station on Channel 228C (93.5 MHz) in Laughlin, Nevada

HEARING DESIGNATION ORDER

Adopted: March 15, 1991; Released: April 4, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *EEO.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area.[1] Although LBLP, Playa, Davis, Tuna, Southern, Brush, Soto, and Kravitz have filed such statements, they are deficient. LBLP and Playa have has not listed minority and women's organizations to encourage the referral of qualified minority and women job applicants or employment referral services which specialize in minority and woman candidates. The statements filed by the other listed applicants are deficient in the following ways:

APPLICANTS	DEFICIENCY
Davis	No Black or Hispanic recruitment sources
Tuna	No Hispanic recruitment sources
Southern	No Hispanic recruitment sources
Brush	No Black or Hispanic recruitment sources
SOTO	No Black recruitment sources
Kravitz	No Hispanic recruitment sources

Accordingly, these applicants will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. Our engineering study indicates that the proposals of First, Desert, Eells, Davis, Southern, Brush, Radioactive, SOTO, and Kravitz may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that these applicants may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since these proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the listed applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the effects of all nearby radiation sources. In this regard, if the site is presently fenced in compliance with the guidelines, the applicant is required to so state and give the distance from the base of the tower to the fence.[2,3] Accordingly, the applicants will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the submitted Environmental Assessments, that the subject proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Judge shall thereafter not consider the environmental effects of the proposals. See Section 1.1308(d) of the Commission's Rules.

4. *LBLP.* LBLP is a limited partnership with one controlling general partner, Shirley Z. Inutan, and one insulated limited partner, The RadioActive Group, Inc. The sole principal of the RadioActive Group, Inc. is Bruce M. Lyons. In the *Hearing Designation Order (Walpole, New Hampshire)* in MM Docket No. 90-421, DA 90-1217, released October 3, 1990, the Commission designated undisclosed party-in-interest and qualifications issues against Mr. Lyons based on his involvment in Maxine Snow's application (BPH-880126NX) for a new FM Station in Lebanon, New Hampshire. Accordingly, grant of LBLP's application here will be subject to the outcome of of these issues in that proceeding.

5. *Playa.* Playa filed an amendment on January 10, 1990, seeking therein a new transmitter location and related engineering changes. In lieu of specifying antenna height data on page 2 of Section V (FCC Form 301), the applicant referenced an exhibit to the amendment. The heights indicated in the accompanying exhibits, however, are inconsistent regarding the value for the antenna center of radiation above average terrain (HAAT). According to both the "abstract" and the "engineering statement," the HAAT is 557.4 meters, whereas Exhibit 6 specifies 595.73 meters as the average of the eight radials, and Exhibit 9 specifies 597.86 meters. Were they listed in an application, these conflicting values would cause the application to be returned as untenderable pursuant to the "hard look" promulgated in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936 (1985). However, the hard look does not apply to amendments, and Playa's January 10 amendment may be considered. *See The Taber Broadcasting Company*, 4 FCC Rcd 7892 (1989). Nevertheless, Playa is required to amend further to specify the correct HAAT. If appropriate, Playa must also amend to specify correct distances to the 60 and 70 dBu contours as well as an updated and accurate coverage map.

6. *Tuna.* In response to Question 1, Section III (Form 301), Tuna did not certify the existence of sufficient net liquid assets on hand or sufficent funds available from committed sources to construct and operate the proposed facilities for three months without revenue. However, in response to Questions 2 and 3, the applicant estimated $225,000 total funds necessary and identified the source of the funds as Larry S. Tunforss, a principal of Tuna. Thus, it appears that the "no" answer to Question 1 was inadvertent. However, in light of the discrepancy, and out of an abundance of caution, a financial issue will be specified.

7. Tuna principal Larry Tunforss is an employee of stations KBAS, Bullhead City, Arizona and KWAZ(FM), Needles, California. Mr. Tunforss has at various times been an on-air personality, salesperson, sales manager, director of marketing services, and operations manager. These stations are located close enough to Laughlin that Mr. Tunforss' connection with them could violate the Commission's cross-interest policy. However, Mr. Tunforss has promised to sever any connection with these stations prior to the commencement of program test authority of the Laughlin station. Accordingly, an appropriate condition will be specified.

8. Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Radioactive has not completed Item 6 correctly, as it lists a post office box as the residence address for principal John L. Low, Jr. Accordingly, Radioactive must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge.

9. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
Desert	February 17, 1990; March 6, 1990; May 1, 1990; July 23, 1990
Eells	January 30, 1990

10. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Playa would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

11. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to First, Desert, Eells, Davis, Southern, Brush, Radioactive, SOTO, or Kravitz in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment to determine whether or not the proposal in consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Playa would constitute a hazard to air navigation.

3. To determine, with respect to Tuna, whether the applicant is financially qualified.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, LBLP, Playa, Davis, Tuna, Southern, Brush, SOTO, and Kravitz shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

15. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Eells and SOTO shall file the technical amendment required by Paragraph 3 above with the presiding Administrative Law Judge.

16. IS IT FURTHER ORDERED, That any grant of LBLP's application is subject to the outcome of issues 1 and 2 specifed against Bruce M. Lyons in the Walpole, New Hampshire *Hearing Designation Order* discussed in Paragraph 4 above.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Playa shall submit Section V information as specified in Paragraph 5 herein to the Presiding Administrative Law Judge.

18. IT IS FURTHER ORDERED, That in the event of grant of a construction permit to Tuna, the permit shall contain the conditon that Mr. Larry Tunforss divest himself of any interest in, and sever all connections with, Stations KBAS, Bullhead City, Arizona, and KWAZ(FM), Needles, California.

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Radioactive shall file the correct information required by Section II, Item 6 of FCC Form 301 with respect to John L. Low, Jr. with the presiding Administrative Law Judge.

20. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Desert and Eells, ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

22. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

23. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

24. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The labor force in Clark County, Nevada, is 8.4% black and 7.1% Hispanic.

[2] Eells indicates that his proposal is in compliance with the ANSI RF Standards. Our engineering study indicates that to make that assertion, Eells is relying on his vertical plane radiation pattern. However, studies have shown that, for an antenna side-mounted on a tower, this pattern is not accurate. Accordingly, Eells must submit a more detailed study verifying compliance with the ANSI standard. The showing must, as indicated in the text above, indicate the total contribution of all AM, FM, and TV stations on and in the vicintiy of the tower, and must include the distance from the base of the tower to any fence that may built.

[3] While SOTO also indicates that its proposal will comply with the ANSI RF standards, the engineering statement submitted with the application states that the applicant assumes a "best case performance" for the proposed facility. However, SOTO makes no supportive showing to demonstrate that the proposed antenna is a "best case" antenna. Our study, based on the "worst case" methods from the OST Bulletin, indicates that SOTO's proposed operation may significantly exceed the Commission's RF guidelines. Accordingly, SOTO must submit an amendment verifying the "best case" operation of its proposed antenna and/or compliance with the ANSI standards.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-533

In the Matter of

Amendment of Section 73.202(b), RM-7529
Table of Allotments,
FM Broadcast Stations.
(Florence, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 27, 1991; Released: April 5, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6624 (1990), issued in response to a petition filed by Coast Radio Broadcasting, Inc. (petitioner). The *Notice* proposed the allotment of Channel 295A to Florence, Oregon, as the community's second local FM service. Petitioner and Coquille River Broadcasters, Inc., licensee of Stations KWRO(AM) and KSRM-FM, Coquille, Oregon, filed comments in support of the *Notice* stating their intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 295A to Florence, Oregon, since it would provide the community with its second local FM service. Channel 295A can be allotted to Florence in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 20, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Florence, Oregon	284C, 295A

4. The window period for filing applications will open on **May 21, 1991**, and close on **June 20, 1991**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 295A at Florence are North Latitude 43-58-06 and West Longitude 124-06-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-551

In the Matter of

Amendment of Section 73.202(b), RM-7015
Table of Allotments,
FM Broadcast Stations.
(Clarksdale and Water Valley,
Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 27, 1991; Released: April 5, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8471 (1989), proposing the substitution of FM Channel 268C3 for Channel 269A at Clarksdale, Mississippi. The *Notice* was issued in response to a petition filed by Sunflower Broadcasting Co., Inc. (petitioner). Petitioner also requested modification of its license for Station WWUN(FM) to specify operation on the higher class channel. Petitioner's proposal requires the substitution of Channel 288A for Channel 268A at Water Valley, Mississippi. Petitioner filed comments and reply comments reaffirming its interest in Channel 268C3 at Clarksdale. Sharing the Word of God Ministries, Inc., applicant for Channel 268A, Water Valley (880404MA), filed comments agreeing to the substitution.

2. We believe the public interest would be served by the substitution of FM Channel 268C3 for Channel 269A at Clarksdale, since it would provide the community with a wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[1] As indicated in the *Notice*, it is necessary to substitute Channel 288A for Channel 268A at Water Valley, Mississippi. The substitution at Water Valley can be accomplished in compliance with the minimum distance separation requirements at the allotment site coordinates for Channel 268A.[2] We note that the coordinates specified in the application for Channel 268A may be used for Channel 288A as well. [3] Therefore, we shall substitute FM Channel 288A for Channel 268A at Water Valley, Mississippi. In accordance with Commission policy, the applicant will retain filing protection since the class of channel substituted is equivalent. *See Phillipsburg, Kansas*, 48 FR 10844 (1983). In addition, we have authorized a modification of petitioner's license for Station WWUN(FM), Clarksdale, Mississippi, to specify operation on Channel 268C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 20, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Clarksdale, Mississippi	243C3, 268C3, 292A
Water Valley, Mississippi	288A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WWUN(FM), Clarksdale, Mississippi, IS MODIFIED to specify operation on Channel 268C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the applicant for Channel 268A at Water Valley:

Hudie C. Holifield, President
Sharing the Word of God Ministries, Inc.
555 Magnolia Road
Jackson, Mississippi 39209

6. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 268C3 are 34-18-00 and 90-32-30.

[2] The coordinates for Channel 288A are 34-07-14 and 89-36-38.

[3] The application of Sharing the Word of God Ministries, Inc., specifies a site at 34-07-01 and 89-38-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-94

In the Matter of

Amendment of Section 73.202(b), RM-7662
Table of Allotments,
FM Broadcast Stations.
(La Crescent, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 27, 1991; Released: April 5, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by White Eagle Broadcasting, Inc. (petitioner), requesting the substitution of Channel 274C3 for Channel 274A at La Crescent, Minnesota. Petitioner also requests modification of its license for Station KQEG, Channel 274A, to specify operation on Channel 274C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 274C3 can be allotted to La Crescent, Minnesota, in compliance with the Commission's Rules at petitioner's specified site.[1] We shall also propose to modify the license for Station KQEG, Channel 274A, to specify operation on Channel 274C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for La Crescent, Minnesota, the Commission seeks comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
La Crescent, Minnesota	274A	274C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 28, 1991**, and reply comments on or before **June 12, 1991**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

J. Richard Carr
Peper, Martin, Jensen, Maichel and Hetlage
1875 Eye Street, N.W., Suite 1200
Washington, D.C. 20006
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 274C3 are 43-45-30 and 91-17-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-35

In the Matter of

Policies and Rules Concerning
Operator Service Access and
Pay Telephone Compensation

ORDER

Adopted: March 27, 1991; Released: March 28, 1991

By the Deputy Chief, Common Carrier Bureau:

1. On March 20, 1991, the American Public Communications Council (APCC) filed a "Request for Extension of Time," moving that we extend the deadlines for filing initial comments and reply comments in the above-captioned proceeding to April 12 and April 26, 1991, respectively.[1] In support of its request, APCC cites the complexities of the issues in this proceeding and the scheduling of its own seminar program and trade show on dates shortly before the initial comment deadline. APCC states that it wishes to consult its members at the meetings before submitting its comments in this docket.

2. It is the policy of the Commission that extensions of time shall not be routinely granted.2 As APCC recognizes in its motion, the Commission must meet a statutory deadline in this proceeding.[3] Given this requirement, any extension of the filing deadlines would limit the amount of time that can be devoted to consideration of the comments and replies that are ultimately filed. Moreover, we do not wish to delay unnecessarily the expeditious resolution of this proceeding. We believe that parties interested in this proceeding have had sufficient time to study the implications of the Commission's proposals. Hence, we are not persuaded by the circumstances presented by APCC and do not believe that an extension of time is warranted.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Request for Extension of Time filed by the American Public Communications Council on March 20, 1991, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] In the Notice of Proposed Rule Making that initiated this proceeding, the Commission ordered that initial comments be filed by April 5, 1991, and that reply comments be filed by April 19, 1991. *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*: Notice of Proposed Rule Making, CC Docket No. 91-35, FCC 91-53, para. 36 (released March 11, 1991) (hereinafter *NPRM*).

[2] *See* Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

[3] The Commission initiated this proceeding pursuant to Section 226(e) of the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (1990) (to be codified at 47 U.S.C. § 226). Under that provision, the Commission must consider specified operator service access and payphone compensation issues within 9 months of the statute's enactment, i.e., by July 17, 1991. *See* 47 U.S.C. § 226(e).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Northwestern Bell
Telephone Company,
Complainant,

v. File No. E-89-238

U.S. Link
Defendant.

ORDER

Adopted: March 25, 1991; Released: April 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. By letter dated March 5, 1991, US West Communications, Inc., (USWC), on behalf of Northwestern Bell Telephone Company, requested permission to withdraw the above-captioned formal complaint against U.S. Link. USWC represents in its letter that the parties have engaged in discussions which have produced a resolution of the dispute.

2. We are satisfied that withdrawal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for withdrawal of the above-captioned complaint IS GRANTED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Wyoco, Inc. File No. 91072
Gilette, Wyoming

For a Waiver of the Rules to
Allow Use of MAS Frequencies
for Point-to-Point Communication

ORDER

Adopted: March 29, 1991; Released: April 5, 1991

By the Chief, Land Mobile and Microwave Division:

1. Wyoco Inc. (Wyoco) seeks waiver of Section 94.65(a) of the Commission's Rules, 47 C.F.R. § 94.65(a), to allow full duplex point-to-point communication on a frequency pair reserved for Multiple Address Systems (MAS) in the Private Operational Fixed Microwave Service (OFS). Section 94.65(a) requires that each master station operating on an MAS paired channel serve a minimum of four remote stations. Wyoco proposes use of MAS frequencies (952.21875/928.21875) to link a master station with a single remote station.

2. In support of its request, Wyoco states that customers of its Specialized Mobile Radio System station at Wright, Wyoming wish to interconnect with the public switched telephone network at the local exchange in Gilette. Wyoco's proposed MAS link would serve this purpose. Wyoco asserts that the use of a 12.5 kHz bandwidth frequency would be more spectrally efficient than use of other OFS channels of larger bandwidth. It claims further that the rural nature of the area insures that the supply of MAS frequencies will not be exhausted. Finally, Wyoco states that its proposal permits use of equipment that it already possesses, enabling it to expand service to its customers. The sparsely populated nature of its service area makes investment in new equipment unlikely, Wyoco concludes.

3. Section 94.65(a) establishes criteria insuring that MAS spectrum allocated for omnidirectional transmission is used effectively. Wyoco's proposed directional point-to-point transmission is clearly inconsistent with the omnidirectional, point-to-multipoint transmission contemplated by our allocation scheme for the frequencies in question. Such inefficient use of spectrum cannot be justified here, since Wyoco's goals could be accomplished within existing rules using 50 kHz point-to-point frequencies. Wyoco's stated reason for rejecting this approach, the cost of acquiring new equipment, is specifically rejected in Section 94.15(c) of our Rules, 47 C.F.R. § 94.15(c).

4. Wyoco has demonstrated no unique circumstances here and its proposal can be achieved within existing rules. Further, a grant of its request would be spectrally inefficient and would undermine the intent of Section 94.65(a), which is to preserve MAS frequencies for omnidirectional, point-to-multipoint transmission. Under these circumstances, waiver is not warranted. Pursuant to Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.3, the request for waiver filed by Wyoco Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Allocation of 901-902/940-941 MHz
Frequencies to the Private Land
Mobile Radio Services

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 25, 1991; Released: April 5, 1991

By the Commission:

1. Before the Commission is a Petition for Reconsideration filed by the American SMR Network Association, Inc. (ASNA) on July 19, 1990. ASNA requests that the Commission reverse a decision by the Commission's Chief Engineer denying a Petition for Rule Making on allocation of spectrum for the Private Land Mobile Radio Services (PLMRS) filed by ASNA on March 9, 1990. The Commission is denying this request.

2. In its Petition for Rule Making, ASNA requested that the General Purpose Mobile Radio (GPMR) frequencies at 901-902 MHz and 940-941 MHz be reallocated to the Private Land Mobile Services for expansion of fully loaded PLMRS systems. ASNA stated that the additional spectrum was needed to help meet the growing needs of the PLMRS.

3. On June 18, 1990, the Chief Engineer denied ASNA's petition by delegated authority. The letter denying this petition observed that in 1986, the Commission allocated an additional 10 MHz for the PLMRS, that in some congested areas the demand for PLMRS appears to be growing rapidly, and that the spectrum requested might be useful in satisfying that demand. The letter further observed that the Commission had received a competing request from Cellular 21, Inc. to use the 901-902 MHz and 940-941 MHz spectrum for second generation cordless telephones (CT-2). In view of the competing demands for this spectrum, the letter stated that it would be best to build a single, inclusive record on the best use of this spectrum. Accordingly, the letter denied ASNA's petition and stated that, instead, it would be treated as a comment in the *Notice of Inquiry* (*NOI*) on personal communications services (PCS) and that comments would be requested on ASNA's proposal therein.[1] In the *NOI*, the Commission recognized the Chief Engineer's denial of ASNA's petition and indicated that it intended to consider the spectrum needs expressed by ASNA and two other parties against the needs for the spectrum under consideration in that proceeding.

4. On July 19, 1990, ASNA filed a Petition for Reconsideration asking the Commission to reverse the Chief Engineer's decision and initiate a separate proceeding to consider allocating the 901-902 MHz and the 940-941 MHz bands for the PLMRS. ASNA argues that the decision to incorporate its request for these GPMR frequencies in the PCS proceeding fails to respond to what it contends is a current critical need for additional spectrum for PLMRS expansion. ASNA also contends that the Commission was not responsive to PLMRS needs in the *NOI* because it did not propose an allocation for the PLMRS.

5. We continue to believe that the most appropriate approach for addressing ASNA's request is to consider it in the context of other competing demands for the 901-902 MHz and 940-941 MHz spectrum. As indicated in the Chief Engineer's letter of denial and the Commission's *NOI* in the PCS proceeding, this will allow the Commission to obtain a single, inclusive record on the best use of this spectrum. We recognize that the demand for PLMRS services is growing and that providers of these services are facing increasing difficulty in meeting user needs in the congested areas. However, we also observe that, in addition to more spectrum, PLMRS providers could seek to meet the increasing demands for service in congested areas through the use of more efficient technology. For example, the use of digital technologies could significantly increase the communications capacity of current PLMRS allocations. We believe that the public interest would be better served by first encouraging PLMRS providers to use more efficient technology rather than acting now to initiate a separate proceeding to allocate additional spectrum for this service. Therefore, until these avenues have been explored, we will defer proposing any new spectrum allocations for PLMRS.

6. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 301 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301 and 303(r), the petition for reconsideration filed by American SMR Network Association, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] *See Notice of Inquiry* in GEN Docket No. 90-314, adopted on June 14, 1990, 5 FCC Rcd 3995 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-554

In the Matter of

An Inquiry Relating to
Preparation for the
International Telecommunication
Union World Administrative
Radio Conference for Dealing
with Frequency Allocations
in Certain Parts of the Spectrum

SUPPLEMENTAL NOTICE OF INQUIRY

Adopted: March 14, 1991; Released: March 20, 1991

By the Commission:

INTRODUCTION

1. This *Supplemental Notice of Inquiry* (*Supplemental NOI*) solicits comments on additional Commission proposals for the World Administrative Radio Conference scheduled for February 3-March 5, 1992 (WARC-92) in Spain. This *Supplemental NOI* is not intended to supplant the *Second Notice of Inquiry (Second NOI)*. However, it will explore new allocations and concepts. All proposals contained in the *Second NOI* remain under active consideration. Specifically, the *Supplemental NOI* requests comments on proposals for a broadcasting satellite (sound) service, including the accommodation of complementary terrestrial sound broadcasting uses within this allocation (hereafter referred to as Digital Audio Broadcasting (DAB)), mobile satellite service (MSS), low-earth orbit satellite service (LEOs), future public land mobile telecommunication system (FPLMTS), inter-satellite service links for LEO satellites and high definition television service (HDTV) to be provided by BSS. Comments to this *Supplemental NOI* and the previously-issued *Notice of Inquiry* and *Second NOI* will be used to prepare a Commission report that will recommend proposals for WARC-92 to the U.S. Department of State.

BACKGROUND

2. In November 1989, the Commission initiated this proceeding by adopting a *Notice of Inquiry* (*NOI*).[1] The *NOI* followed the 13th Plenipotentiary Conference (Plenipot), which determined that a WARC should be held in 1992 to address frequency allocations in certain parts of the spectrum. The *NOI* requested comment on the projected frequency needs of the HF (3-30 MHz) broadcasting service, mobile services in the 500-3000 MHz range, high-quality audio or High Definition Television delivered by the broadcasting satellite service, and new space services above 20 GHz. In June 1990, the International Telecommunication Union (ITU) Administrative Council expanded the WARC-92 agenda to include additional issues, such as an allocation for low earth orbit satellites, related to those recommended by the Plenipot. In September 1990, the Commission adopted a *Second Notice of Inquiry* (*Second NOI*) that made specific proposals for some of the services discussed in the *NOI* and discussed the additional issues addressed by the ITU Administrative Council.[2]

3. The purpose of this *Supplemental NOI* is to solicit comments on new proposals and concepts which will complement the information obtained as a result of the previously issued *NOI* and *Second NOI*.

DIGITAL AUDIO BROADCASTING (DAB)

4.The *Second NOI* proposes three options for satisfying the spectrum requirements for broadcasting satellite service (sound) (BSS (sound)) with complementary terrestrial broadcasting. Briefly, the options in frequency order are: a) to allocate the 728-788 MHz UHF TV band to BSS (Sound) on a coprimary basis through the addition of a footnote to the allocation Table; b) to allocate the 1493 to 1525 MHz band to BSS (sound) and broadcasting on a co-primary basis and reaccommodate the aeronautical mobile telemetry users to the 2390-2420 MHz band; and c) to allocate the 2390-2450 MHz band to BSS (sound) and broadcasting on a co-primary basis.[3] In all three options, we recognize that the domestic implementation of BSS (sound) requires vacating and reaccommodating the existing users in each proposed frequency band.

5. Further studies of this issue have been undertaken within the FCC Industry Advisory Committee on WARC-92 (IAC) and within the U.S. CCIR preparations for the JIWP-WARC-92. These studies confirm the difficulty of sharing spectrum with DAB. The JIWP 10-11/1 report states that "in nearly all cases considered, such protection will require significant geographic separations between the boresight of the BSS (sound) service area and the receiving stations in the existing services."[4]

6. Since the issuance of the *Second NOI*, we have been examining more closely the three options to determine which option is more likely to be acceptable to the proponents of DAB, while creating the least impact on the existing users. We have also continued our discussions with the Executive Branch, and have had some consultations with other administrations. We have also taken into account events that have taken place at the Commission that affect these options. All of these actions affect our deliberations on this matter.

7.The Commission has decided to simulcast transmission of advanced television (ATV) along with the improved NTSC signal.[5] This means that the additional spectrum made available by using the improved NTSC receiver will most likely be needed to simulcast the ATV signal. Thus, the likelihood of spectrum being available to accommodate DAB in the UHF-TV band has decreased at least for the immediate future.

8. In the *Second NOI*, we note that the Executive Branch opposes our option to reallocate the 1493-1525 MHz band to BSS (sound) and broadcasting because of the adverse effect on aeronautical mobile test and telemetry operations.[6] The Executive Branch has reaffirmed their objections to using any portion of the 1435-1525 MHz band for DAB. The Executive Branch offers an option (Option #4) of reallocating 50 megahertz in the 2360-2410 MHz band. This band is currently allocated to

aeronautical mobile telemetry and other users.[7] RR 751 would be modified to remove the aeronautical mobile telemetry from the 2360-2390 MHz band. The existing services are proposed to continue to operate on a secondary basis. Additional footnote regulations are proposed to permit the existing users to operate on a primary basis until January 1, 1997 or until such time as the broadcasting satellite (sound) or broadcasting service is brought into use in such a manner as to affect or be affected by the existing service operations in the geographic area of concern, whichever is later. We solicit comments on the feasibility of this proposal as well.

9. This Executive Branch proposal is a variation of the 2390-2450 MHz option to satisfy DAB.[8] As noted in the *Second NOI*, DAB use of the 2400-2450 MHz band still has significant difficulties sharing spectrum with Industrial, Scientific and Medical (ISM) equipment operating in the 2400-2500 MHz band, particularly microwave ovens. Recent U.S. JIWP WARC-92 studies regarding BSS (sound) indicate that sharing with these microwave ovens appears to be difficult. The BSS (sound) receivers will probably not be able to obtain sufficient geographic separation from microwave ovens to avoid interference due to the susceptibility of the BSS receiver.[9] This study assumes that the BSS(sound) receivers operate co-frequency with the microwave ovens. The Executive Branch proposal allocates BSS (sound) in the 2400-2410 MHz portion of the ISM band. We request comments on whether the potential for ISM interference to BSS (sound) or terrestrial broadcasting is as significant in this 10 megahertz band overlap as indicated by this study.

10. We have learned through bilateral and multilateral consultations that some countries are considering different frequency bands to satisfy the BSS (sound) requirement. In the Western Hemisphere, proposals for the 1435-1525 MHz and the UHF-TV bands (700-800 MHz) have been discussed.[10] Other countries are considering the 2500-2690 MHz band to satisfy this requirement. In particular, a proposal under consideration in Europe is to allocate the 2570-2620 MHz band with a time phased implementation. Approximately sixteen (16) megahertz of the BSS (sound) allocation would be available in the year 2000. The full allocation could be brought into use no earlier than around the year 2005, unless agreed by all parties. Given the difficulties noted above for the UHF-TV band and the 1.5 GHz band options and the fact that the 2500-2690 MHz band is used domestically by the Instructional Television Fixed Service and the Multichannel Multipoint Distribution Service,[11] it appears that it may be difficult to reach consensus on a common worldwide allocation to satisfy this requirement. We request comment on whether there is a need for a common worldwide allocation for BSS (sound) and complementary terrestrial broadcasting. If different bands are considered possible in the three Regions, do the allocations need to be near each other in frequency or can they be significantly different bands, such as 700-800 MHz, 1.5 GHz and 2.4 GHz? Finally, we request comment on possible ways that the requirements for DAB for approximately 100 MHz of spectrum (40 megahertz for terrestrial and 60 megahertz for satellite, as defined by the Industry Advisory Committee (IAC) and others) could be satisfied with the lesser amounts proposed in the four options under consideration in this proceeding. For example, could the same spectrum be shared by both terrestrial and satellite delivered DAB in the same geographic area?

MOBILE SATELLITE SERVICES

SPECTRUM REQUIREMENTS

11. The *Second NOI* proposes some additional allocations to satisfy the increasing demands for mobile satellite services. These proposals are to add the mobile satellite service (MSS) in the 1525-1530 MHz band in the space-to-Earth direction and to the radiodetermination satellite service (RDSS) bands in the 1610-1626.5 MHz (Earth-to-space) and 2483.5-2500 MHz (space-to-Earth). The proposal also states that the MSS systems in the latter two bands would need to use code division multiple access (CDMA) operating characteristics that were compatible with the RDSS systems in the band. The *Second NOI* states further that we would consider proposals for 2500-2535VMHz (satellite-to-mobile) and 2655-2690 MHz (mobile-tosatellite) if the necessary analyses, technical sharing criteria and appropriate sharing arrangements are provided which demonstrate compatible operations between the MSS and existing services in these bands. The 2390-2450 MHz band was also recognized as a potential MSS (Earth-to-space) allocation, if the band was not proposed for reallocation to BSS (sound) or did not need to be used to reaccommodate the aeronautical mobile telemetry users from the 1435-1525 MHz band. The *Second NOI* acknowledges further that these proposals may not be sufficient to satisfy all of the MSS spectrum requirements for future systems but that these proposals are the best that could be identified at that point in time.

12. We have been continuing our efforts to determine the amount of spectrum required by MSS and to identify additional bands to satisfy the MSS spectrum requirements. Since the issuance of the *Second NOI*, the Commission's Industry Advisory Committee (IAC) for WARC-92 and CCIR IWP 8/15 have developed their estimates of the spectrum requirement for all MSS for both the geostationary satellite systems and potential low earth orbit satellite systems. The IAC is recommending that, in addition to the bands proposed in the *Second NOI* at 1525-1530, 1610-1626.5 and 2483.5-2500 MHz, that additional MSS spectrum be allocated. The amount of spectrum requested is 44.8 MHz (minimum) in each direction up to 175.4 MHz (likely) in each direction.[12] Similarly, the CCIR IWP 8/15 Report estimates the total MSS spectrum requirement to be 80.5 MHz (minimum) with 138 MHz (likely) in each direction.[13] Reducing this total by 34 MHz currently allocated in the 1.5/1.6 GHz band to the various mobile satellite services in each direction provides a requirement of 46.5 MHz (minimum) with 104 MHz (likely) in each direction. These spectrum requirement estimates are based upon satisfying a potential mobile user population which has requirements to communicate from aeronautical, maritime, land mobile and hand portable platforms and represents a summation of the estimated demand for these mobile satellite services.

13. Some of the requirements of this mobile user population could be satisfied either by mobile satellite services using geostationary satellite or low earth satellite systems and by the future public land mobile telecommunication system (FPLMTS). In addition, it is not clear either in the IAC Report or the CCIR IWP 8/15 Report that all of this MSS demand need be satisfied in the 1 to 3 GHz band. Some U.S. MSS requirements are currently being satisfied in the fixed satellite service bands (FSS) at 14.0-14.5 GHz

(uplink) and the 11.7 - 12.2 GHz (downlink) where the mobile satellite service can operate on a secondary non-interference basis. Because there is some overlap in all of the requirements between the GSO and LEO systems and the terrestrial mobile services, we believe that it is reasonable: a) to try to satisfy a minimum requirement (40 MHz) for MSS for geostationary satellite services, b) to provide some spectrum that would be shared between GSO and LEO systems and c) to provide some spectrum where the Commission has the flexibility to expand to satisfy the future mobile requirement through LEO or terrestrial means. We consequently have searched to determine some additional bands which could satisfy the LEO MSS requirement above 1 GHz which would be near spectrum that would also be eventually considered for future terrestrial mobile services.

GEOSTATIONARY SATELLITE SYSTEMS

14. We have identified an additional 40 MHz of spectrum for MSS in each direction to satisfy most of the minimum MSS spectrum requirement. This spectrum is intended for use by geostationary satellite systems. This amount of spectrum combined with the alternatives previously discussed represents a reasonable accommodation of the MSS GSO requirement.

15. The IAC provided several candidate bands for consideration to satisfy the MSS spectrum requirements.[14] In our search to identify specific bands for these services we have considered these bands as well as others. We have examined these bands with the intent of minimizing the impact on both the existing user and the future MSS user. The difficulty associated with the bands identified is that sharing with existing services on a primary basis does not seem feasible for various reasons and that reaccommodating existing users that could not operate on a secondary basis with MSS has to be considered.

16. As a result of this band search and in coordination with the Executive Branch, we propose the bands 2110-2130 MHz and 2160-2180 MHZ for MSS (space-to-Earth) and the 2410-2450 MHz band for MSS (Earth-to-space). The 2.1 GHz band proposals are on a co-primary basis with existing services, which are point to point common carrier microwave and paging services. Additionally channel 2 (2156-2162) is used by the multipoint distribution service in the largest 50 metropolitan areas and 2110-2120 MHz is used for uplinks to deep space probes. Our intent is to reaccommodate these domestic users as the MSS service is implemented.[15] The common carrier microwave higher frequency bands are being vacated by many commercial users because this traffic is being moved to fiber optic cable. Since these bands are already allocated on a primary basis to the fixed service internationally there is no need to provide additional proposals. The topic of how to reaccommodate these existing users, e.g., point to point microwave users, will be the subject of a domestic proceeding in the future, if the WARC-92 adopts these MSS proposals.

17. As noted in the *Second NOI,* we propose to allocate 2410-2450 MHz to MSS (Earth-to-space). As a result of further coordination with the Executive Branch on satisfying the MSS and the BSS (sound) requirements, we have determined that each of the users of and proponents for this spectrum would need to share some of the burden to accommodate each other's requirements. Since the latest variation of the 2.4 GHz option to satisfy the BSS requirement will not use 2410-2450 MHz and the aeronautical mobile telemetry operations appear to be able to accept lesser spectrum in this frequency range, we propose the 2410-2450 MHz band as a primary MSS uplink allocation.[16] The fixed, mobile and radiolocation services are also proposed to continue to operate as secondary services beginning January 1, 1997 or until the MSS has been brought into use in such a manner as to affect or be affected by the existing services operating in that band in a given geographic area of concern. In addition, we believe that the amateur and amateur satellite services could continue to operate on a secondary basis. As noted in the *Second NOI,* Industrial, Scientific and Medical equipment operate at 2450 MHz $\pm$ 50 MHz. This is a particular problem for receivers that would be in close proximity to ISM equipment which includes microwave ovens. However, for the MSS uplink allocation, the satellite receiver will be at the GSO and the propagation effects should Vhelp mitigate the potential interference to the MSS satellite receiver.[17] We solicit comments on the feasibility of having MSS satellite receivers operate within this ISM environment providing a potentially significant ambient noise level within which to operate. We also request comments on the feasibility of these proposals for providing additional MSS allocations and the impact upon existing users in the band.[18] If these proposals are not feasible, we would then consider bands above 2300 MHz band as an alternate proposal for MSS (Earth-to-space). This may have an impact upon the Executive Branch proposal to satisfy the BSS (sound) requirement and modification to the BSS (sound) proposal may also be required, if we decide to pursue that option. We request comments on this alternative proposal.

18. As indicated above, the *Second NOI* notes proposals for the 2500-2535 and 2655-2690 MHz band subject to further study on sharing feasibility among others. The IAC considered these bands as candidates for MSS for use outside North America.[19] We note further in the *Second NOI* that these bands are used domestically by the Instructional Television Fixed Service (ITFS), Multichannel Multipoint Distribution Service (MMDS) and the Private Operational Fixed microwave service. Since the issuance of the *Second NOI,* the Commission has received thousands of applications for the MMDS as a result of recent relaxation of the rules governing this service.[20] It is apparent that there is great demand to provide MMDS and that unless sharing is proven feasible with the MMDS, it would be unlikely that this band could be used for the MSS in the U.S. However, ITU RR 754 and 766 currently allocates the 2500-2535 MHz and the 2655-2690 MHz bands to the MSS in the downlink and uplink direction respectively in Region 3 subject to agreement obtained under the procedure set forth in Article 14 and subject to limiting operations within national boundaries. We propose to expand these Radio Regulations to include ITU Region 1 as a way to provide additional spectrum in the other Regions which would not be used in Region 2 (North and South America). These proposals do not follow the usual U.S. practice of making proposals that satisfy U.S. needs directly. It is an indirect way to make spectrum available for the U.S. by providing alternative MSS spectrum in other Regions. Because of the coordination difficulties associated with the MSS and the fact that there currently is very little mobile earth station antenna discrimination, this proposal would provide additional spectrum for national MSS systems to be separate from global systems. In this way, this proposal

would provide some relief to the increasing MSS congestion in the 1.5/1.6 GHz bands. We seek comment on this proposal and its utility in satisfying the worldwide demand for MSS. We recognize that this service would not be implemented in the U.S. unless sharing studies demonstrate that MSS can share with the existing services. We also request sharing criteria that would be appropriate for inclusion in ITU Articles 27 and 28 to insure that Region 2 terrestrial services operating in these bands can be protected from MSS in Regions 1 and 3.[21]

LOW EARTH ORBIT (LEO) MSS SATELLITE SYSTEMS ABOVE 1 GHZ[22]

19. The *Second NOI* did not address the topic of LEO MSS systems operating above 1 GHz. Since the release of the *Second NOI*, the Commission has received two applications (Ellipsat and Iridium) proposing LEO mobile satellite services in conjunction with the radiodetermination satellite service. Each satellite system proposal is measurably different. Both however propose to use 1610-1626.5 MHz. Iridium will use it for both up and down link transmissions and Ellipsat proposes to use it for uplinks with its downlinks in 2483.5-2500 MHz. In addition, Motorola indicates that it will eventually need 100 MHz of spectrum to support this system and proposes that MSS allocations be extended from 1626.5 to 1660.5 MHz on a bidirectional basis.[23]

20. We are examining these LEO MSS system proposals in the context of WARC-92 allocation requirements. These proposals have an immediate requirement as indicated in the respective applications and a longer term requirement as indicated by the IAC and Motorola for future development of the Iridium type systems.

21. The *Second NOI* proposes to add MSS allocations to the RDSS bands 1610-1626.5 MHz and 2483.5-2500 MHz for uplink and downlink transmission respectively. It also proposes that these MSS services have compatible CDMA characteristics with the existing RDSS systems and comply with power flux density and other restrictions of Article 27, 28 etc. The intention of these provisions is to insure that the MSS systems would be able to coordinate operations with the RDSS and would be compatible with other services operating in the proposed bands. The question, however, is what are compatible CDMA characteristics and how can they be internationally regulated. The Ellipsat application provides an FDMA/CDMA modulation architecture that was not originally envisioned for the RDSS where the CDMA signal occupied the entire 16.5 megahertz and coordination of systems was envisioned to require the coordination of coding schemes. Similarly, the Iridium system provides a completely different modulation architecture and provides service for both the uplink and downlink in one frequency band 1610-1626.5 MHz. Motorola and Ellipsat claim that each is respectively compatible with the RDSS systems. Both also provide sharing schemes to support their contentions of protection to radio astronomy and other users in the frequency band.[24] Because of these concerns about sharing with existing geostationary satellite systems and radio astronomy, we propose to add MSS (space-to-Earth) in the 1613.8-1626.5 MHz band on a secondary basis, subject to further studies demonstrating that it can share with the other services operating in the band.[25] If these studies support the feasibility of sharing, we will propose primary allocations. We seek comments on this proposal and ADD RR733Z which addresses the question of compatible characteristics for the MSS and RDSS systems. We seek to know whether such a provision (ADD RR733Z) is needed in the Radio Regulations, and how such a provision could be implemented internationally. Finally, we are concerned about the coordination of GSO and non-GSO systems. We seek comments on how LEO systems could be implemented while protecting other systems both LEO and GSO systems and whether RR2613 requires modification. Are procedures in addition to ITU Article 11 and 13 required? Should LEO systems be subject to Article 14? The IAC has provided some information concerning sharing criteria for LEO operations below 1 GHZ (See Annex B). We request comments on these sharing criteria and whether additional criteria are necessary and can be made available for LEO operations above 1 GHz.[26] Annex C also contains information from the IAC concerning the coordination process for non-geostationary mobile satellite services below 1 GHz.[27] We solicit comments on the regulatory process proposed in this annex and its general applicability to non-geostationary systems above, as well as below 1 GHz.

22. The longer term requirement for LEO spectrum, as requested by Motorola, is to use the 1626.5-1660.5 MHz for the expansion of the Iridium system. To date, however, Motorola has not provided analyses to support its assertion that it can share on a co-frequency bidirectional basis with the other mobile satellite services in the band. In addition, it has not addressed the priority and preemption requirements for aeronautical and maritime safety services in the respective bands as proposed in the *Second NOI*. In particular, we have indicated in our licensing proceeding that MSS systems intending to provide service in these bands in the United States must be able to satisfy the priority and preemption requirements and be interoperable with other satellite systems providing aeronautical mobile satellite safety services.[28]

23. In light of these factors, we are reluctant to consider LEO MSS allocations in these frequency bands. Instead, we propose to add a footnote to allocate 1850-1990 MHz to MSS without a direction indicator, subject to additional studies to demonstrate that sharing with the fixed and mobile operations in these bands is feasible. We seek comments on any sharing criteria that would make the MSS compatible with the terrestrial services operating in this band recognizing that geographic separations may be required between the mobile earth terminals and the terrestrial services. We are particularly concerned if the band is used in the United States by LEO MSS and in adjacent countries by the other services. This proposal will provide flexibility for the Commission to decide, in some future domestic rulemaking proceeding, how to use this band for personal communications systems, fixed services and mobile satellite services.

FUTURE PUBLIC LAND MOBILE TELECOMMUNICATION SYSTEM (FPLMTS)

24. The *Second NOI* proposes no additional mobile allocations specifically to satisfy personal communications systems and FPLMTS requirements. The *Second NOI* recognizes that Region 2 has primary mobile allocations between the 1710-2500 MHz band, which provide sufficient flexibility to allow the Commission to reallocate spectrum to this service as necessary in a domestic rulemaking.[29] The *Second NOI* also notes that the draft report of IWP 8/13 identified a requirement for a com-

mon 60 megahertz for international roaming.[30] The CCIR IWP 8/15 report confirmed this 60 megahertz requirement for personal station roaming and indicated that one important requirement is that the band of operation utilized worldwide be within the frequency agility of the personal stations.[31] The IWP 8/15 Report further states that "... while a common frequency band is preferred, this may not be immediately feasible. A degree of commonality can be obtained through regional/international compatibility with a common signalling band and sufficient overlap of traffic bands to ensure compatibility for roaming." We agree that compatibility of roaming is important. However, we are not convinced that an exclusive worldwide mobile service allocation is necessary to achieve the desired compatibility. If commenters disagree and believe an exclusive worldwide allocation is needed, we request they identify the specific frequency band to be allocated and their rationale for the allocation.[32] Further, the 60 megahertz specified as the "requirement" appears to be excessive. We request comments on the minimum allocation necessary to provide the desired service. Finally, if commenters agree that an exclusive worldwide allocation is not needed, we request comment on how the desired compatibility can be achieved.

SPACE RESEARCH (DEEP SPACE)

25. The band 2110-2120 MHz is also allocated for Earth-to-space transmissions in the space research (deep space) service, internationally, subject to coordination under the provisions of Article 14 of the Radio Regulations (RR 748.)[33] We propose to remove the encumbrance of seeking agreement with other administrations required by the provisions of Article 14 by upgrading this allocation to primary status in the Table of Allocations and deleting RR 748. There is no intent to change the current domestic regulations or coordination practices with other domestic users. Since this band is also proposed to satisfy future MSS (space-to-Earth) requirements, preliminary sharing studies indicate that space research (Earth-to-space) service is compatible with the MSS (space-to-Earth) service. We solicit comments on this proposal and its effect on existing users and on the ability of the space research (deep space) (Earth-to-space) service to share with MSS (space-to-Earth).

INTER-SATELLITE SERVICE

26. Since the beginning of the WARC-92 proceeding, there has been an enormous increase in interest in various types of mobile-satellite services. Our *Second NOI* touches upon the spectrum requirements for these services, but fails to address in any detail requirements for inter-satellite links between mobile-satellites. Inter-Satellite Service allocations currently exist at 22.55-23.55 GHz, 32-33 GHz, and several higher bands. It is not clear at this time, however, whether these existing bands will be sufficient to accommodate the new perceived needs for inter-satellite links between the various mobile-satellite services, either in terms of total spectrum requirements or in terms of sharing between the geostationary and non-geostationary satellite systems. We are therefore soliciting comment on a preliminary proposal to add the Inter-Satellite Service to the 21.7-22 GHz band. Commenters should focus on whether additional spectrum beyond that in the current international Table of Allocations is required, whether the amount of spectrum proposed herein is sufficient to meet the perceived additional needs of mobile-satellite systems, and whether the inter-satellite service links can share successfully with the existing services in this band.

HIGH DEFINITION TELEVISION (HDTV)

27. In our *Second NOI*, we state a preference to use the existing 12 GHz BSS band to accommodate the needs of a future wide-rf band HDTV BSS service. We also propose that WARC-92 should also consider use of the 17.3-17.7 GHz band for possible future generations of HDTV. Since the release of the *Second NOI*, we have become aware that some countries are considering use of the 24.25-25.25 GHz band for HDTV-BSS. This band is currently allocated to the radionavigation service on a primary, worldwide basis, but is also currently unused for that or any other purpose. In our *Second NOI*, we propose that this band be allocated to the radiolocation-satellite service and the space research service (Earth-to-space). We have since been informed that NASA is abandoning consideration of adding space research in this band. Upon further consideration, we believe that the newly proposed radiolocation-satellite service and the BSS may be able to each occupy a portion of this band and thereby meet the requirements of all three. We therefore propose for public comment that the 24.25 - 25.25 GHz band be divided so as to provide 100 MHz for the radiolocation-satellite service, 300 MHz for the radionavigation service, and 600 MHz for the broadcasting-satellite service.

ADMINISTRATIVE

28. Authority for this *Supplemental Notice of Inquiry* is contained in Sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303 (r), and 403. Pursuant to Section 1.1204(a)(4) of the Commission's Rules, 47 CFR Section 1.1204(a)(4), no ex parte restrictions apply to this proceeding.

29. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR Section 1.415 and 1.419, interested parties may file comments on or before **April 12, 1991,** and reply comments on or before **April 26, 1991.** All relevant and timely comments will be considered by the Commission before taking further action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street NW, Washington, DC 20554.

30. For further information concerning this *Supplemental NOI*, contact Mr. William Torak, Office of Engineering and Technology, (202)632-7025.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Notice of Inquiry (NOI)*, GEN Docket No. 89-554, 4 FCC Rcd 8546 (1989).

[2] *Second Notice of Inquiry, (Second NOI)*, GEN Docket No. 89-554, 5 FCC Rcd 6046 (1989).

[3] *Second NOI*, para. 99 - 104.

[4] International Radio Consultative Committee (CCIR) Joint Interim Working Party (JIWP 10-11/1) meeting, Sydney, Australia, Doc. No. JIWP 10-11/1-62, 28 Nov. 1990, section 5.1.4.

[5] *First Report and Order*, MM Docket No. 87-268, 5 FCC Rcd 5627 (1990) .

[6] *Second NOI*, footnote 55.

[7] The band is allocated internationally in ITU Region 2 to the fixed, mobile and radiolocation services on a primary basis. The amateur service is allocated on a secondary basis. Domestically, we have provided priority to the aeronautical mobile telemetry uses within the mobile service. The 2310-2390 MHz band is also used by the commercial expendable launch vehicle industry according to US276. The Executive Branch also notes that active and passive operations at Goldstone, California and Arecibo, Puerto Rico are conducted in the 2310-2330 MHz band and that the 2300-2310 MHz band is needed as a guard band to the current Deep Space Network operations below 2300 MHz.

[8] Currently, however, questions also exist as to whether options three or four could accommodate a stand-alone terrestrial service.

[9] U.S. JIWP WARC- 92 - #23 Rev.2 Interference to BSS(sound) Reception from Industrial, Scientific, and Medical Emissions in the Band 2400 - 2500 MHZ, Dated February 4, 1991.

[10] See Draft Proposals of Canada, for the World Administrative Radio Conference - 92, dated January 10, 1991.

[11] See *infra*, para. 18 and *Second NOI*, para. 69.

[12] IAC Report, IAC No.37, December 3, 1990, Second Interim Report of Ad Hoc Group C of IWG-2 Mobile Satellite Services, section 2.4.

[13] CCIR IWP 8/15 Report, Helsinki, Finland, November 12-21, 1991, section 6.1.1.3.1.7.

[14] The IAC provided the following candidate bands for consideration in its interim report, (IAC-27) August 7, 1990: 1260 - 1300 MHz, 1350 - 1400 MHz, 1429 - 1525 MHz, 1710 - 1850 MHz, 1850 - 1885 MHz, 1955 - 1990 MHz, 1990 - 2110 MHz, 2165 -2200 MHz, 2390 - 2425 MHz, or 2390 - 2450 MHz, 2450 - 2483.5 MHz, 2500 - 2535 MHz and 2655 - 2690 MHz. On February 20, 1991, the IAC, (IAC-42) requested the Commission provide for public comment the following candidate bands to satisfy the MSS requirements: 1525 - 1530 MHz (downlink), 1485 - 1525 MHz (downlink), 1350 - 1390 MHz (uplink) or 1850 - 1990 MHz (uplink), 1955 - 1990 MHz (downlink), 2165 - 2200 MHz (uplink) or 2390 - 2425 MHz (uplink) and to be used outside North America 2500 - 2535 MHz (downlink) with 2655 - 2690 MHz (uplink).

[15] The space research (deep space) service will be retained. See *infra*, para. 25.

[16] See *supra*, para. 8.

[17] We have performed a preliminary assessment of the potential interference from microwave ovens to GSO satellite receivers. The Food and Drug Administration has specified emission limits for microwave ovens for biological hazard purposes of 1mW/ cm squared @ 5 cm for a new unit and 5mw/cm squared @ 5 cm for a unit in use (FDA 21CFR 103.109(c)). This equates to an equivalent isotropically radiated power of -5 dBW and 2 dBW respectively. If we consider that there could be a half million simultaneously active units operating on the same frequency within the mainbeam of the satellite receiver and each unit has a nominal in-band power of -5 dBW, the total equivalent isotropically radiated power (E.I.R.P.) could be between 37 and 42 dBW from the ensemble of microwave ovens assuming building penetration losses of 10 to 15 dB. If this aggregate ISM emission is spread evenly across the 100 megahertz wide ISM band, the effective E.I.R.P density per 50 kHz would be as high as 4 to 9 dBW. This represents a somewhat worse case for a number of reasons. All half million units must be operating simultaneously, which may only occur during certain times of the day, such as at meal times particularly in the evening. All the microwave ovens must operate on the same frequency. The emission spectrum for such ovens is very peaky and it is not clear that each microwave oven has its peak energy at the same frequency, even though it appears that the microwave oven emission moves across the 2400 - 2500 MHz band randomly during microwave oven operation. The statistical distribution of these microwave ovens in use simultaneously at the same frequency must be taken into account in further analysis before any definitive conclusions can be reached.

[18] In the U.S., the 2410 - 2450 MHz band is allocated by the Government Radiolocation service on a primary basis and to the amateur and amateur satellite services on a secondary basis, as noted in the *Second NOI*, *supra*.

[19] See *supra*, foonote 12.

[20] *Report and Order*, GEN. Docket No. 90-54, GEN. Docket No. 80-113, 5 FCC Rcd 6410 (1990).

[21] The ITU Radio Regulations Article 27 RR 2505, 2506 2507 and 2509 should be examined for limits on mobile and fixed stations. Article 28 RR 2541, 2543, 2546, 2550, 2556, 2561, 2562, and 2563 should be examined with respect to potential constraints placed on the MSS.

[22] Low Earth orbit satellites are meant herein to include all Earth satellites that are not using geostationary satellite orbits. These orbits can be circular or highly elliptical orbits with the latter having a high altitude and elevation apogee of the orbit so that the satellite is visible to a particular geographic area on the earth's surface for a large period of time of each satellite's orbit.

[23] IAC Report, IAC-42, requests the Commission provide for public comment the bands 1429-1525 MHz and 1610-1660.5 MHz for bidirectional MSS use. See also IAC-27 and addendum section 3.6 from Interim Report of Ad Hoc Group C of IWG-2. The Executive Branch difficulties that apply to BSS (sound) in the 14351525 MHz also apply to MSS.

[24] Ellipsat indicates that it will share the uplinks with Radio astronomy using the same frequency sharing mechanisms as the RDSS users. Motorola states it will not transmit in the uplink or downlink directions in the 1610-1613.8 MHz band in order to protect radio astronomy observations.

[25] The *Second NOI*, paragraph 72 raises concerns about sharing MSS with the Glonass system which is under consideration for use with the U.S. GPS for the development of a Global Navigation Satellite System (GNSS) within the auspices of the

International Civil Aviation Organization (ICAO). Similar concern is raised with regard to LEO systems in this band and the secondary allocation to MSS (space-to-Earth) in the 1613.8-1626.5 MHz band. It appears that the MSS downlink signals could be received directly by the Glonass system. In addition, the LEO satellites in this band have a potential of causing interference through ground reflection of the downlink signal. We solicit comment on the feasibility of sharing LEO satellite systems with other systems operating in the 1610-1626.5 Mhz band, with emphasis on these potential interference situations.

[28] *Memorandum Opinion, Order and Authorization,* GEN Docket 84-1234, FCC 89-183, adopted May 31, 1989, released August 4, 1989, para. 94 , and *Memorandum Opinion and Order,* GEN Docket 84-1234, FCC 89-181, adopted May 31, 1989, released August 4, 1989, para. 42 and 46.

[29] *Second NOI,* at para. 50, p. 24.

[30] *Second NOI,* footnote 33, p. 22.

[31] CCIR IWP 8/15 Report, Helsinki, Finland, November 12 - 21, 1991, section 6.3.3.3.1.2.

[32] Apple Computer, Inc. has filed a petition for rulemaking on January 28, 1991, to amend Section 2.106 of the Commission's Rules to establish a new radio service for Local Area High Speed Data Communications among personal computing devices. We also solicit comment on whether a common worldwide frequency band is needed for the roaming of personal computer stations.

[33] Within the United States, this band is also allocated to Earth-to space transmissions in the space research (deep space) service at Goldstone California in accordance with U.S. footnote 252.

RECOMMENDED U.S. PROPOSALS -- SUPPLEMENTAL DRAFT

UNITED STATES PROPOSALS

for the

WORLD ADMINISTRATIVE RADIO CONFERENCE

(SPAIN, 1992)

WASHINGTON, D.C.

April, 1991

METHOD OF PRESENTATION

1. Services shown in all capital letters (*e.g.*, FIXED) in the Allocation Table are services with primary status.

2. Services shown with an initial capital letter and the remaining letters in lower case (*e.g.*, Fixed) in the Allocation Table are services with secondary status.

3. Underlining (*e.g.*, Underline) indicates new text proposed for adoption.

4. Struck out text (*e.g.*, ~~Strikeout~~) indicates existing text proposed for deletion.

5. NOC indicates provisions for which no change is being proposed.

6. NOC indicates matter of special significance, for which it is important that no changes be made to the current provisions.

7. SUP indicates provisions which are proposed for suppression.

8. MOD indicates a proposed modification to the existing text.

9. (MOD) indicates proposed modifications which are strictly editorial in nature.

10. ADD indicates new provisions which are being proposed for addition.

MHz
1610 - 1626.5

MOD

Allocation to Services		
Region 1	Region 2	Region 3
1610 - 1626.5	1610 - 1626.5	1610 - 1626.5
AERONAUTICAL RADIONAVIGATION	AERONAUTICAL RADIONAVIGATION	AERONAUTICAL RADIONAVIGATION
RADIODETERMINATION-SATELLITE (Earth-to-space) 733A	RADIODETERMINATION-SATELLITE (Earth-to-space) 733A	~~Radiodetermination-Satellite (Earth-to-space) 733A 733E~~ RADIODETERMINATION-SATELLITE (Earth-to-space) 733A
MOBILE-SATELLITE (Earth-to-space)	MOBILE-SATELLITE (Earth-to-space)	MOBILE-SATELLITE (Earth-to-space)
722 727 730 731 731A 731B 731D 732 733 733B 733E 733X ~~733F~~ 734 733Z 733Y	722 731B 731C 732 733 733C 733D 734 733Z 733Y 733X	722 727 730 731B 731C 732 733 733B 733E 734 733Z 733X 733Y

SUP 733F
Mob-87

ADD 733X Harmful interference shall not be caused to stations of the radio astronomy service using the band 1610.6 - 1613.8 MHz by stations of the mobile-satellite service, however, the provisions of No. 733 apply.

ADD 733Y The band 1613.8 - 1626.5 MHz is also allocated to the mobile-satellite service (space-to-Earth) on a secondary basis.

ADD 733Z The radiodetermination-satellite service and the mobile-satellite service are limited to using compatible characteristics.

Reason:

To provide additional allocations for the mobile-satellite service. The radiodetermination-satellite service and mobile-satellite service are to have compatible characteristics. It is necessary as a consequence to upgrade the radiodetermination-satellite service in Regions 1 and 3 to a co-primary service with the mobile-satellite service. Further study is required to determine how to regulate the RDSS and MSS to ensure that the characteristics of these two services are compatible, especially if low Earth orbit satellite systems are added. Additional sharing criteria are also required for other services. (See ¶ 21, Supplemental NOI)

MHz
1710 - 2120

	Allocation to Services		
	Region 1	Region 2	Region 3
MOD	1710 - ~~2290~~ 2025 FIXED Mobile 722 743A 744 746 746A ~~747 748 750~~	1710 - ~~2290~~ 2025 FIXED MOBILE 722 744 745 746 746A ~~747 748 749 750~~	
MOD	~~1710~~ 2025 - ~~2290~~ 2110 FIXED SPACE RESEARCH (Earth-to-space) (Space-to-space) SPACE OPERATION (Earth-to-space) (Space-to-space) EARTH EXPLORATION- SATELLITE (Earth- to-space) (Space- to-space) Mobile ~~722~~ 743A ~~744~~ ~~746~~ ~~747~~ ~~748~~ ~~750~~	~~1710~~ 2025 - ~~2290~~ 2110 FIXED SPACE RESEARCH (Earth-to-space) (Space-to-space) SPACE OPERATION (Earth-to-space) (Space-to-space) EARTH EXPLORATION-SATELLITE (Earth-to-space) (Space-to-space) MOBILE ~~722~~ ~~744~~ ~~745~~ ~~746~~ ~~747~~ ~~748~~ ~~749~~ ~~750~~	
	~~1710~~ 2110 - ~~2290~~ 2120 FIXED MOBILE-SATELLITE (Space-to-Earth) SPACE RESEARCH (Earth-to-space) (Deep Space) Mobile ~~722~~ 743A ~~744~~ ~~746~~ ~~747~~ ~~748~~ ~~750~~	~~1710~~ 2110 - ~~2290~~ 2120 FIXED MOBILE-SATELLITE (Space-to-Earth) MOBILE SPACE RESEARCH (Earth-to-space) (Deep Space) ~~722~~ ~~744~~ ~~745~~ ~~746~~ ~~747~~ ~~748~~ ~~749~~ ~~750~~	

ADD 746A The band 1850 - 1990 MHz is also allocated to the mobile-satellite service on a primary basis.

SUP 749

Reason:
To provide additional allocations for the mobile-satellite service to permit flexibility to provide for the developing requirements for this service. To elevate the space research, space operation, and earth exploration-satellite service to primary status to facilitate the coordination of these services. The time period for RR 749 has expired.

MHz
2120 - 2200

	Allocation to Services		
	Region 1	Region 2	Region 3
MOD	~~1710~~ 2120 - ~~2290~~ 2130 FIXED Mobile MOBILE-SATELLITE (space-to-Earth) ~~722~~ 743A ~~744~~ ~~746~~ ~~747~~ ~~748~~ ~~750~~	~~1710~~ 2120 - ~~2290~~ 2130 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) ~~722~~ ~~744~~ ~~745~~ ~~746~~ ~~747~~ ~~748~~ ~~749~~ ~~750~~	
MOD	~~1710~~ 2130 - ~~2290~~ 2160 FIXED Mobile ~~722~~ 743A ~~744~~ ~~746~~ ~~747~~ ~~748~~ ~~750~~	~~1710~~ 2130 - ~~2290~~ 2160 FIXED MOBILE ~~722~~ ~~744~~ ~~745~~ ~~746~~ ~~747~~ ~~748~~ ~~749~~ ~~750~~	
MOD	~~1710~~ 2160 - ~~2290~~ 2180 FIXED Mobile MOBILE-SATELLITE (space-to-Earth) ~~722~~ 743A ~~744~~ ~~746~~ ~~747~~ ~~748~~ ~~750~~	~~1710~~ 2160 - ~~2290~~ 2180 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) ~~744~~ ~~745~~ ~~746~~ ~~747~~ ~~748~~ ~~750~~	
MOD	~~1710~~ 2180 - ~~2290~~ 2200 FIXED Mobile ~~722~~ 743A ~~744~~ ~~746~~ ~~747~~ ~~748~~ ~~750~~	~~1710~~ 2180 - ~~2290~~ 2200 FIXED MOBILE ~~722~~ ~~744~~ ~~745~~ ~~746~~ ~~747~~ ~~748~~ ~~749~~ ~~750~~	

Reason:

To provide additional allocations for the mobile-satellite service.

MHz
2200 - 2290

	Allocation to Services		
	Region 1	Region 2	Region 3
MOD	~~1710~~ 2200 - 2290 FIXED SPACE RESEARCH (Space-to-Earth) (Space-to-space) SPACE OPERATION (Space-to-Earth) (Space-to-space) EARTH EXPLORATION-SATELLITE (Space-to-Earth) (Space-to-space) Mobile ~~722~~ 743A ~~744~~ ~~746~~ ~~747~~ ~~748~~ ~~750~~	~~1710~~ 2200 - 2290 FIXED SPACE RESEARCH (Space-to-Earth) (Space-to-space) SPACE OPERATION (Space-to-Earth) (Space-to-space) EARTH EXPLORATION-SATELLITE (Space-to-Earth) (Space-to-space) MOBILE ~~722~~ ~~744~~ ~~745~~ ~~746~~ ~~747~~ ~~748~~ ~~749~~ ~~750~~	

SUP 747

SUP 748

SUP 750

Reasons:

1. To provide a primary allocation for space services that support safety communications for satellites and manned space flight missions; to eliminate the Article 14 coordination requirement for these services.

2. In order to protect the fixed and mobile operations, the PFD limit in No. 2559 will be extended to these bands.

3. Deletion of footnotes 722, 744, 745, 746, 748, and 749; and the suppression of footnotes 747, 748, and 750 in the various bands is a consequence of the primary allocation to the space research, space operation, and earth exploration-satellite services under the new proposed band limits.

MHz
2300 - 2450

	Allocation to Services		
	Region 1	Region 2	Region 3
MOD	2300 - ~~2450~~ 2360 FIXED Amateur Mobile Radiolocation 664 743A ~~752~~	2300 - ~~2450~~ 2360 FIXED MOBILE RADIOLOCATION Amateur 664 MOD 751 ~~752~~	
MOD	~~2300~~ 2360 - ~~2450~~ 2410 BROADCASTING-SATELLITE(sound) BROADCASTING ~~FIXED~~ Fixed 751A Amateur Mobile Radiolocation 664 743A 752	~~2300~~ 2360 - ~~2450~~ 2410 BROADCASTING-SATELLITE (sound) BROADCASTING ~~FIXED~~ Fixed 751A ~~MOBILE~~ Mobile 751B ~~RADIOLOCATION~~ Radiolocation 751C Amateur 664 ~~751~~ 752	
MOD	~~2300~~ 2410 - 2450 Fixed 752A ~~FIXED~~ Amateur Mobile Radiolocation MOBILE-SATELLITE (Earth-to-space) 664 743A 752	~~2300~~ 2410 - 2450 Fixed 752A ~~FIXED~~ Mobile 752C ~~MOBILE~~ ~~RADIOLOCATION~~ Radiolocation 752B Amateur MOBILE-SATELLITE (Earth-to-space) 664 ~~751~~ 752	

MOD 751 In Australia, the United States and Papua New Guinea, the use of the band 2310 - ~~2390~~ 2360 MHz by the aeronautical mobile service for telemetry has priority over other uses by the mobile service.

Reason:

To provide allocations for broadcasting-satellite and broadcasting in the 2360 - 2440 MHz band.

ADD 751A The fixed service may continue to operate in a specific service area in the band 2360 - 2410 MHz on a primary basis until 1 January 1997 or until a broadcasting-satellite (sound) service or broadcasting service has been brought into use in such a manner as to affect or be affected by the fixed service in that service area, whichever is later.

ADD 751B The mobile service may continue to operate in a specific service area in the band 2360 - 2410 MHz on a primary basis until 1 January 1997 or until a broadcasting-satellite (sound) service or broadcasting service has been brought into use in such a manner as to affect or be affected by the mobile service in that service area, whichever is later.

ADD 751C The radiolocation service may continue to operate in a specific service area in the band 2360 - 2410 MHz on a primary basis until 1 January 1997 or until a broadcasting-satellite (sound) service or broadcasting service has been brought into use in such a manner as to affect or be affected by the radiolocation service in that service area, whichever is later.

ADD 752A The fixed service may continue to operate in a specific service area in the band 2410 - 2450 MHz on a primary basis until 1 January 1997 or until a mobile-satellite service (Earth-to-space) has been brought into use in such a manner as to affect or be affected by the fixed service in that service area, whichever is later.

ADD 752B The radiolocation service may continue to operate in a specific service area in the band 2410 - 2450 MHz on a primary basis until 1 January 1997 or until a mobile-satellite service (Earth-to-space) has been brought into use in such a manner as to affect or be affected by the radiolocation service in that service area, whichever is later.

ADD 752C The mobile service may continue to operate in a specific service area in the band 2410 - 2450 MHz on a primary basis until 1 January 1997 or until a mobile-satellite service (Earth-to-space) has been brought into use in such a manner as to affect or be affected by the mobile service in that service area, whichever is later.

Reason:

These proposals are to provide allocations for the Broadcasting-Satellite Service (sound) with a complementary Broadcasting Service and the mobile-satellite service (Earth-to-space). These allocations will permit flexibility to provide for the developing requirements for these services.

MHz
2500 - 2655

Allocation to Services		
Region 1	Region 2	Region 3
2500 - 2655 FIXED 762 763 764 MOBILE (except aero-nautical mobile) BROADCASTING-SATELLITE 757 760

MHz
2655 - 2690

Allocation to Services		
Region 1	Region 2	Region 3
2655 -2690 FIXED 762 763 764 MOBILE except aero- nautical mobile BROADCASTING- SATELLITE 757 760 Earth Exploration- Satellite (passive) Radio Astronomy Space Research (passive) 758 759 765 <u>766</u>	2655 - 2690 FIXED 762 764 FIXED-SATELLITE (Earth-to space) (space-to-Earth) 761 MOBILE except aero- nautical mobile BROADCASTING- SATELLITE 757 760 Earth Exploration- Satellite (passive) Radio Astronomy Space Research (passive) 765	2655 - 2690 FIXED 762 764 FIXED-SATELLITE (Earth-to space) 761 MOBILE except aero- nautical mobile BROADCASTING- SATELLITE 757 760 Earth Exploration- Satellite (passive) Radio Astronomy Space Research (passive) 765 766

MOD 766 Subject to agreement obtained under the procedure set forth in Article 14, the band 2655 - 2690 MHz may also be used in Regions <u>1 and</u> 3 for the mobile-satellite (Earth-to-space)~~, except aeronautical mobile-satellite,~~ service for operation limited to within national boundaries.

<u>Reason:</u>

To provide additional allocations for the mobile-satellite service.

GHz
21.4 - 22

	Allocation to Services		
	Region 1	Region 2	Region 3
MOD	21.4 - ~~22~~ 21.7 FIXED MOBILE		
MOD	~~21.4~~ 21.7 - 22 FIXED MOBILE INTER-SATELLITE		

Reason:

To provide an additional allocation for inter-satellite links between mobile-satellite service satellites.

GHz
24.25 - 25.25

	Allocation to Services		
	Region 1	Region 2	Region 3
MOD	24.25 - ~~25.25~~ 24.55 RADIONAVIGATION		
MOD	~~24.25~~ 24.55 - ~~25.25~~ 24.65 ~~RADIONAVIGATION~~ RADIOLOCATION-SATELLITE SERVICE		
MOD	~~24.25~~ 24.65 - 25.25 ~~RADIONAVIGATION~~ BROADCASTING-SATELLITE		

Reason:

1. To provide for a satellite based location and messaging service.

2. To provide an alternative allocation to meet HDTV-BSS requirements that may not be able to be satisfied in the 12 GHz BSS allocations.

Proposed Modification to Article 28

1.0 Introduction

Article 28 of the Radio Regulations concerns sharing between Space Radiocommunication Services Sharing Frequency Bands with Terrestrial Radiocommunication Services. At the present these apply above 1 GHz. This paper sets forth regulatory proposals to provide the necessary sharing criteria for the shared mobile satellite service in certain bands below 1 GHz. This will require modification of the title, and sections II, and IV.

2.0 Modification of Title

The title of Article 28 should be modified to eliminate the phrase "Above 1 GHz". This is a change consequential to including criteria of space/terrestrial sharing below 1 GHz.

3.0 Proposed Modifications to Section II

Add 2537 #2. (1) Mobile Earth Stations and Earth Stations below 1 GHz.

Add 2838 (2) the equivalent isotropically radiated power (e.i.r.p.) transmitted in any direction towards the horizon by an earth station or a mobile earth station operating in the frequency bands below 1 GHz, using FDMA or CDMA transmissions shall not exceed the following limits:

-26 dBW/Hz

(FDMA duty cycle ≤ 0.05% and CDMA duty cycle = 1% in 1 MHz band.

ADD 2539 (3) the limit given in No. 2538 apply in the following frequency bands allocated to the mobile satellite service, and the space operation service, where these bands are shared with the Fixed and Mobile Services.

148-149.9 MHz, 173.4-174 MHz, 400.15-401
(if used as uplink)

Reason: To put an upper limit in the uplink MSS transmissions to permit sharing with other services in the band.

MOD 2539 to 2536.

Reason: Consequential to the proposed RR additions above.

4.0 Proposed Modifications to Section IV

Add 2581 (10) Power flux density limits below 1 GHz for FDMA transmissions.

Add 2587 (a) the power flux density at the Earth's surface produced by emissions from a space station shall not exceed -160 dBW/m²/Hz.

Add 2588 (b) the limit given in No. 2587 applies in the allocations given in 2589 which are allocated Fixed and Mobile Services.

Add 2589 420-421 MHz, 930-931 MHz

Add 2590 (c) the power flux density at the Earth's surface produced by emissions from a space station shall not exceed -210 dBW/m²/Hz. (out of band)

(d) the limit given in No. 2590 applies in the allocation given in 2591 which are Space Service allocations.

Add 2591 137-138 MHz, 400.15-401 (if used as downlink)

Add 2592 (11) Power Flux density limits below 1 GHz for CDMA transmissions.

(a) the power flux density at the Earth's surface produced by emissions from a space station shall not exceed -200 dBW/m²

Add 2593 (b) the limit given in 2592 applies in the allocation given in 2594 which are allocated to Fixed and Mobile Services.

Add 2594 420 - 421 MHz, 930 -931 MHz

Add 2595 (c) The Power Flux density at the Earth's surface produced by emissions from a space station shall not exceed -213 dBW/m²/Hz, which are allocated to Space Services.

Add 2595 (d) The limit given in 2595 applies in the allocation given in 2596.

Add 2596 137 -138 MHz.

COORDINATION PROCESS FOR
NON-GEOSTATIONARY MOBILE SATELLITE SERVICE BELOW 1 GHz

The primary purpose of the ITU Rules and Regulations is to permit all Administrations to make use of spectrum resources as requirements arise. Existing procedures allow for open entry into all space telecommunications services and provide a measure of protection for existing users, while ensuring accommodation of new systems as the requirements of Administrations develop or change.

Articles 11 and 13 of these regulations presently provide for the Advance Publication and Registration of non-geostationary satellites. They do not provide for coordination of non-geostationary systems such as LEO MSS below 1 GHz systems. The IAC recognizes that along with an allocation of spectrum, a process for coordinating between and among multiple LEO MSS below 1 GHz systems must be proposed. Whatever process for coordination is adopted must allow for entry into the LEO MSS below 1 GHz service by all Administrations with requirements in this service.

At present, low earth orbiting satellites are advanced published in accordance with Article 11/Appendix 4 of the Radio Regulations. The IAC supports that the LEO MSS below 1 GHz service would be made explicitly subject to the requirements of Advance Publication and that the information in Appendix 4 would be furnished to all Administrations by the IFRB in the customary "circular" notices. This will provide notice to all Administrations of technical parameters and geographic coverage of new LEO MSS below 1 GHz requirements. With this information, Administrations can determine if a newly-proposed LEO MSS below 1 GHz network may affect the operation of existing or planned systems. This can be accomplished through an appropriate application of Appendix 29.[1]

IAC proposes that the United States support a modification to Article 11 and Appendix 29 which would establish the basis for the obligation of Administrations to coordinate use of LEO MSS below 1 GHz networks when a newly-advanced published system increases the level of network noise by more than six per cent in any overlapping geographic service area(s) of existing or previously advanced published systems. Administrations whose system(s) exceed

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[1] Such an application would entail use of a new Annex tailored to determining the increase in noise temperature between LEO networks as a function of orbit coverage.

this threshold level of interference noise temperature would be required to exchange information necessary to understand the technical parameters of the affected systems and to accommodate each others' systems so as to avoid mutually unacceptable interference. When such accommodation has been achieved the Board would be notified and Registration could proceed.

In any coordination pursuant to the process above, all Administrations would be bound to conform to the sharing criteria set out in the proposed modifications to Article 28 of the Radio Regulations.

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